In the Supreme Court of the United States

OCTOBER TERM, 1972

JAMES D. HODGSON, SECRETARY OF LABOR, PETITIONER

v.

ARNHEIM AND NEELY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The opinion, judgment and order on rehearing of the Third Circuit are printed in the Appendix to the Petition for a Writ of Certiorari at pages 13-53.

DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Date	Proceedings
1967	
Oct. 5	Complaint filed.
Oct. 6	Summons issued.
Oct. 12	Summons returned served on deft. on 10-9-67.
Oct. 20	Praecipe for appearance filed by Strassburger and McKenna, Esqrs. as counsel for deft.
Oct. 20	ANSWER filed by deft.
1968	
Jan. 17	Motion to Intervene as a deft. filed by the Institute of Real Estate Management of the National Association of Real Estate Boards with ANSWER of said intervening deft. thereon.
Feb. 1	Order dated 1/31/68 entered fixing pretrial procedure. (Miller, J.)
Feb. 6	Order entered directing that if the pltf. or the deft. have any objections to the intervention of the Institute of Real Estate Management of the National Association of Real Estate Boards, said objections shall be filed within 15 days from the date hereof. (Miller, J.)
Feb. 13	Objection to Motion for Intervention, filed by pltf.
Feb. 15	Motion for extension of pretrial order filed by pltf.
Feb. 15	Order entered directing that the time within which the pltf. is directed to file pretrial statement is extended to on or before 3-15-68 & the subsequent time limits established in pretrial order, dated 1-31-68, are similarly extended, each for a 30 day period. (Miller, J.)

Date	Proceedings
1968	
Feb. 27	Interrogatories to deft. filed by pltf. (Nos. 1-21)
March 7	Motion filed and Order entered suspending pretrial Orders entered until further Order. (Miller, J.)
March 27	Order entered dated 3/26/68 continuing hearing on Motion to intervene until further Order. (Miller, J.)
March 27	Hearing begun 3/26/68 on Motion to Intervene before Miller. Hearing memo filed. (No rep.)
May 3	Order entered directing that the argument set for 5-8-68 is postponed pending further order of Court. (Miller, J.)
Aug. 30	Motion to continue argument on objection to petition for intervention set for 9/10/68 filed by U. S. with proposed order thereon.
Sept. 9	Order entered on 8/30/68 Motion continuing argument on Objection to Petition for Intervention until further Order. (Miller, J.)
Dec. 19	Stipulation of counsel filed.
1969	
Jan. 3	Proposed order for granting motion of The Institution of Real Estate Management of the National Association of Real Estate Boards to intervene filed by counsel.
Jan. 14	Order, dated 1-13-69, entered directing that the motion of The Institution of Real Estate Management of the National Association of Real Estate Boards to intervene is granted, with the understanding that litigation will not be extended beyond the facts relating to the business operations of deft. during the relevant period. (Miller, J.)
Feb. 12	Motion filed and Order entered substituting George P. Shultz as party pltf. (Weber, J.)

Date	Proceedings
1969	
March 20	Motion for Summary Judgment filed by pltf.
April 9	Notice and Motion for Summary Judgment filed by deft.
May 22	Hearing on motions for summary judgment begun and concluded before C.A.V. before Miller, J. Hearing memo filed. (Rep. D. Harrington)
June 9	Transcript filed re: Argument on motions for summary judgment held at Pgh. on 5-22-69 before Miller, J. (Rep. D. Harrington)
Sept. 30	Opinion and Order entered directing counsel for pltf., after notice to counsel for deft. and intervener, file proposed form of order for final judgment within 20 days. (Miller, J.)
Oct. 6	Order amending opinion. (Miller, J.)
Dec. 17	Order entered granting deft. and deft. Intervenor's cross motion for summary judgment with respect to wage payments made prior to 2/1/67; granting pltf's. motion for summary judgment with respect to wage payments made after 2/1/67; further ordered that no injunction will be entered regarding future violations of the Act. (Miller, J.)
Dec. 17	Pursuant to Order entered, Summary Judgments are hereby entered accordingly. James H. Wallace, Jr., Clerk
Dec. 18	Notices mailed.
1970	
Jan. 11	Notice of Appeal filed by deft. and intervenor.
Jan. 12	Copies of Notice mailed to Court of Appeals and counsel for the pltf. (U.S. Attorney); letters to counsel for deft. and counsel for intervenor and Judge Miller.
Jan. 16	Notice of Appeal filed by pltf.

Date	Proceedings
1970	
Feb. 18	Copies of Notice mailed ct. of appeals and counsel for deft. and intervenor, letters to counsel for pltf. and Judge Miller.
March 9	Original record mailed Court of Appeals.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CASE NO. 18,722, 18,733, 18744

Date	Filings—Proceedings
1970	
Mar. 27	Copy of Notice of Appeal, rec'd. February 19, 1970, filed. Record, rec'd. March 11, 1970, filed. (Covers 18772/18774).
	. . . .
Aug. 27	Brief for appellant, filed. (Covers 18772 only)
	. . . .
Oct. 29	Brief for appellees and cross appellants, Arnheim and Neely, Inc. and Intervenor The Institute of Real Estate Management, filed. (Covers 18772/18774) (25 copies)
	. . . .
Dec. 23	Reply brief for appellant, filed. Certificate of service attached.
	. . . .
1971	
Mar. 17	Argued. Coram: Adams and Gibbons, Circuit Judges and Whipple District Judge. (Covers 18772/4)
Jun. 15	Opinion of the Court (*Adams* and Gibbons, Circuit Judges and Whipple, District Judge) filed. (Covers 18772/4)

Date	Filings—Proceedings
Jun 15	Judgment reversing the judgment of the District Court, filed December 17, 1969, and remanding the cause so that the Government may have the opportunity to introduce evidence regarding each buildings' gross rentals during the relevant years, in accordance with the opinion of this Court, with costs taxed in favor of appellants in all cases, filed. *Of the District Court for the District of New Jersey, sitting by designation.
	• • • •
Sep. 1	Petition for Rehearing for appellant-cross-appellee, filed. Certificate of service attached.
1972	
Feb. 9	Order (Seitz, Chief Judge and Van Dusen, Aldisert, *Adams*, Gibbons, Rosenn, Circuit Judges and Whipple, District Judge) denying petition for rehearing, filed. (Covers 18772/3/4)
Feb. 17	Certified judgment in lieu of formal mandate issued. (Covers 18772/3/4)
	• • • •
Jun 12	Notice of filing (on June 8, 1972) of petition for writ of certiorari rec'd from Clerk of S.C., filed. (S.C. No. 71-1598) (Covers 18772/4)
Oct. 18	Certified copy of order dated October 10, 1972 granting petition for writ of certiorari rec'd from Clerk of S.C., filed. (S.C. No. 71-1598) (Covers 18772/4)
1971	
[illegible] 1	Petition for rehearing for appellant (Secty of Labor) cross-appellee, filed. Certificate of service attached.

Date	Filings—Proceedings
1972	
Feb. 9	Order (Seitz, Chief Judge and Van Dusen, Aldisert, *Adams*, Gibbons and Rosenn, Circuit Judges and Whipple, District Judge), denying petition for rehearing, filed.
Feb. 17	Certified judgment in lieu of formal mandate issued.

[Caption Omitted]

COMPLAINT

I

Plaintiff, W. Willard Wirtz, Secretary of Labor, United States Department of Labor, brings this action to enjoin defendant from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201, *et seq.* Section references herein are to the Act as amended by the Fair Labor Standards Act Amendments of 1961, 75 Stat. 65, and not as amended by the Fair Labor Standards Act Amendments of 1966, 80 Stat. 830), hereinafter referred to as the Act, including the restraint of any withholding of minimum wage and overtime compensation found by the Court to be due to the employees of the defendant.

II

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III

Defendant Arnheim and Neely, Inc., is, and all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania, having its principal office and place of business at the Grant Building, Pittsburgh, Allegheny County, Commonwealth of Pennsylvania, within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was,

engaged at that place of business and at other buildings in the Pittsburgh area, in real estate management, brokerage sales, real estate appraisals, insurance sales, and miscellaneous other real estate management activities.

IV

That the business activities of Arnheim and Neely, Inc., as described herein, were, and are, related and performed through unified operation and common control for a common business purpose, and constitute an enterprise within the meaning of Section 3(r) of the Act.

V

The total annual gross volume of sales of the enterprise referred to and described in the preceding paragraph is not less than one million dollars ($1,000,000). Defendant's establishments have, and at all times hereinafter mentioned have had, employees engaged in commerce and/or in the production of goods for commerce, and the said enterprise is an enterprise engaged in commerce and/or in the production of goods for commerce, within the meaning of Section 3(s)(3) of the Act

VI

At all times hereinafter mentioned, the defendant has employed, and is employing, several employees in and about its enterprise engaged in real estate management, and the said employees have been, and are, subject to the requirements of the Act applicable to employees engaged in such an enterprise, as defined in Sections 3(r) and 3(s)(3) of the Act, as amended by the Fair Labor Standards Act Amendments of

1961 at 75 Stat. 65. Additionally, the said employees have been since February 1, 1967, and are, subject to the requirements of the Act applicable to employees engaged in such an enterprise as defined in Sections 3(r) and 3(s)(1) of the Act, as amended by the Fair Labor Standards Act Amendments of 1966, 80 Stat. 830.

VII

At all times hereinafter mentioned, the defendant also employed several employees regularly and recurrently engaged in operating passenger elevators carrying mailmen and parcel post deliverymen, delivering mail and other goods continuing in channels of interstate commerce, regularly and recurrently operating freight elevators handling goods continuing in interstate commerce from shipment points outside the Commonwealth of Pennsylvania or being shipped outside the Commonwealth of Pennsylvania, and at all times relevant hereto said employees were engaged in interstate commerce or in the production of goods for interstate commerce, within the meaning of the Act.

VIII

Defendant repeatedly has violated, and is violating, the provisions of Sections 6(b)(1) and 15(a)(2) of the Act by paying several of its employees mentioned in Paragraph VI above for their employment, wages at rates less than those prescribed in Section 6(b)(1) of the Act, since the workweek ending January 4, 1964.

IX

Defendant repeatedly has violated, and is violating, the provisions of Sections 6(a)(1) and 15(a)

(2) of the Act by paying to several of its employees mentioned in Paragraph VII above, for their employment, wages at rates less than those prescribed by Section 6(a)(1) of the Act, since the workweek ending January 4, 1964.

X

Defendant repeatedly has violated, and is violating, the provisions of Sections 7(a)(2) and 15(a)(2) of the Act by employing employees mentioned in Paragraph VI above for workweeks longer than as prescribed in Section 7(a)(2) of the Act, without compensating these employees for employment in excess of the prescribed hours at a rate not less than one and one-half (1½) times the regular rate at which they were employed, since the workweek ending January 4, 1964.

XI

Defendant repeatedly has violated, and is violating, the provisions of Sections 8(a)(1) and 15(a)(2) of the Act by employing several of its employees, mentioned in Paragraph VII above, for workweeks longer than forty (40) hours, in workweeks during such period, at rates not less than one and one-half (1½) times the regular rate at which they are employed, since the workweek ending January 4, 1967.

XII

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of

persons employed, and of the wages, hours, and other conditions and practices of employment, to be made, kept, and preserved by every employer subject to the provisions of the Act. The said regulations, and amendments thereto, were published in the Federal Register and may be found at 29 CFR 516.

XIII

Defendant, an employer subject to the provisions of the Act, repeatedly has violated, and is violating, the provisions of Sections 11(c) and 15(a)(5) of the Act in that since the workweek ending January 4, 1964, it has failed to make, keep, and preserve adequate and accurate records of its employees, and of the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations, in that the records kept by the defendant have failed to show, adequately and accurately, among other things, the correct number of hours worked each workday and each workweek by several of its employees.

XIV

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

WHEREFORE, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the

provisions of Sections 15(a)(2) and 15(a)(5) of the Act, and for such other and further relief as may be necessary and appropriate, including the restraint of unlawful withholding of minimum wage and overtime underpayments found by the Court to be due employees of the defendant.

CHARLES DONAHUE
Solicitor

LOUIS WEINER
Regional Attorney

MARSHALL H. HARRIS
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United States Department
of Labor

GUSTAVE DIAMOND
United States Attorney
Attorneys for Plaintiff

[Filed Oct. 5, 1967]

[Caption Omitted]

ANSWER

I.

The allegations of paragraph I are admitted.

I.

The allegation of paragraph II is admitted.

III.

The allegations of paragraph III are admitted.

IV.

The allegations contained in paragraph IV of the Complaint are denied in their entirety. In further answer thereto, defendant alleges that it manages numerous buildings as agent for various owners, each owner having no relation to any other owner, and having no common business purpose. Defendant is not the owner of any of said buildings.

V.

The allegations contained in paragraph V of the Complaint are denied in their entirety. In further answer thereto, defendant alleges that the total gross volume of defendant is measured by the total commissions received on rentals, and not on gross rentals received as agent for the owners. Total commissions received are substantially less than $1,000,000 annually. Defendant further denies that there exist any establishments as defined by the Fair Labor Standards Act of 1938, as amended, and further de-

nies that it is an enterprise engaged in commerce and/or in the production of goods for commerce within the meaning of said Act.

VI.

The allegations contained in paragraph VI are denied in their entirety. In further answer thereto, defendant alleges that any employees employed outside of the office of defendant are employees of the owners of the various buildings, and not employees of defendant.

VII.

The allegations contained in paragraph VII are denied in their entirety. In further answer thereto, defendant alleges that elevator operators employed in the various buildings managed by defendant are employees of the owners of the buildings, and are not the employees of defendant. Defendant further denies that said elevator operators are engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Act.

VIII.

The allegations contained in paragraph VIII state conclusions of law, for which no answer is necessary, but which, nevertheless, are specifically denied.

IX.

The allegations contained in paragraph IX state conclusions of law, for which no answer is necessary, but which, nevertheless, are specifically denied.

X.

The allegations contained in paragraph X state conclusions of law, for which no answer is necessary, but which, nevertheless, are specifically denied.

XI.

The allegations contained in paragraph XI state conclusions of law, for which no answer is necessary, but which, nevertheless, are specifically denied.

XII.

The allegations of paragraph XII are admitted.

XIII.

The allegations of paragraph XIII are denied in their entirety. In further answer thereto, defendant alleges that it is not subject to the provisions of said Act, and, therefore, not subject to the record keeping required by the Act.

XIV.

Defendant denies that it has repeatedly violated the provisions of the Act.

WHEREFORE, defendant avers that the Complaint should be dismissed.

E. B. STRASSBURGER
Strassburger & McKenna
Attorneys for Defendant

[Filed Oct. 20, 1967]

[Caption Omitted]

ANSWER OF INTERVENER

First Defense

1. The Institute of Real Estate Management of the National Association of Real Estate Boards (hereinafter referred to as "Intervener") admits the averments contained in Paragraphs II and III of the Complaint.

2. Intervener admits the averments contained in Paragraph I of the complaint to the extent they represent that Plaintiff has brought an action against Defendant under the Fair Labor Standards Act of 1938, as amended. Intervener denies any allegations (or inferences arising therefrom) contained in Paragraph I of the complaint which represent that Defendant is in any way covered by or subject to the Fair Labor Standards Act of 1938, as amended.

3. The averments contained in Paragraph XII of the complaint are conclusions of law to which no answer is required.

4. Intervener specifically denies each and every other allegation and conclusion contained in the complaint.

Second Defense

5. Plaintiff's complaint fails to state a claim against Defendant upon which relief can be granted.

Third Defense

6. Plaintiff has failed to join as indispensable parties under Rule 19 the true employers of the em-

ployees mentioned in Paragraphs I, V, VI, VII, VIII, IX, X, XI, and XIII of the complaint.

WHEREFORE, Intervener denies that Plaintiff is entitled to the relief sought, or any portions thereof, and demands judgment dismissing this action, with costs.

FRANK L. SEAMANS
WM. ALVAH STEWART, III
Eckert, Seamans & Cherin
Attorneys for The Institute of Real Estate Management of the National Association of Real Estate Boards, Intervener

[Filed Jan. 17, 1968]

[Caption Omitted]

STIPULATION

I

The pleadings tender the following issues:

1. Are the business activities of Arnheim and Neely, Inc., hereinafter interchangeably referred to as the defendant, particularly those related to the management of various buildings, related activities performed through unified operation or common control for a common business purpose so as to constitute an enterprise within the meaning of Section 3(r) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201, *et seq.*), hereinafter referred to as the Act?

2. Are the various persons employed in maintenance, custodial and operational activities at the buildings managed by the defendant "employees" of the defendant within the meaning of the Act?

3. If there is liability under the Act to any of the employees of any of the buildings managed but not owned by Arnheim and Neely, Inc., is it the liability of the defendant or is it the liability of the owner of the buildings?

4. Among the persons noted in the preceding question employed at the various buildings managed by the defendant, are there at each building at least two persons performing activities which constitute engagement in interstate commerce or in the production of goods for commerce, within the meaning of the Act?

5. Does Arnheim and Neely, Inc., employ anywhere two or more persons performing activities

which constitute engagement in interstate commerce or in the production of goods for commerce, within the meaning of the Act, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce?

6. In determining "annual gross volume of sales made or business done" by the defendant within the meaning of Section 3(a) of the Act, are the gross rentals from the aforementioned management activities to be included or merely the commissions obtained by the defendant from such activities?

7. Prior to February 1, 1967, was defendant's business an enterprise as defined in Sections 3(r) and 3(s)(3) of the Act as it then read?

8. After February 1, 1967, was defendant's business an enterprise as defined in Sections 3(r) and 3(s)(1) of the Act as amended?

II

The parties hereto, for the purpose of this case only, hereby stipulate and agree to the following facts subject to the right of either party to challenge the relevancy or materiality of any of such facts and to introduce additional evidence not inconsistent herewith:

201. The defendant, Arnheim and Neely, Inc., is a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania, having its principal office and place of business at the Grant Building, Pittsburgh, Allegheny County, Commonwealth of Pennsylvania, within the jurisdiction of this court.

202. The intervenor defendant, The Institute of Real Estate Management of the National Associa-

tion of Real Estate Board, is an Illinois corporation with its principal office located in Chicago, Illinois, having approximately 1,650 members who are engaged in the management of real property in 342 different cities in the United States, involving the management of approximately 5,000 apartment buildings and approximately 2,500 office buildings throughout the United States.

208. Arnheim and Neely, Inc. has for several years engaged in the City of Pittsburgh in the following business activities as reflected in their annual, audited financial statements:

a) Commercial rentals of real property;
b) Commercial sales of real property;
c) Sales of fire insurance and other insurance relating to personal property and the use and occupancy of real property;
d) Real estate consultation and appraisals;
e) Residential property rentals;
f) Residential property sales.

204. Arnheim and Neely, Inc. managed, since January 1, 1968, and currently manages, *inter alia*, the following buildings within the Greater Pittsburgh area, except as noted below:

a) Buhl Building (for the Buhl Foundation, Pittsburgh, Pa.);
b) Clark Building (for 701 Liberty Avenue Realty Co., New York, New York, and also for another owner);
c) Eureka Savings Building (formerly for the Estate of Joseph Simon, et al, Pittsburgh, Pa. and currently for The University of Pittsburgh);
d) Keenan Building (for Walter Green and

Frank Calcar, Washington, D.C., for the period ending February 1, 1968);

e) Martin Building (for Martin Building, Inc., Pittsburgh, Pa.);

f) Pittsburgh Life Building (for F. W. Woolworth Co., New York, New York, beginning in September, 1964);

g) 319 Fifth Avenue (for F. W. Woolworth Co., New York, New York, beginning in September, 1964);

h) Pittsburgh Terminal Properties (for Pittsburgh Terminal Properties Corp., Pittsburgh, Pa., beginning in approximately September, 1964);

i) University Square Apartments (for University Square No. 1, Inc., Pittsburgh, Pa.).

205. The rental income collected by the defendant from the aforestated buildings during the calendar year 1964 was as follows:

Buhl Building	$ 93,537.62
Clark Building	800,902.10
Eureka Savings Building	71,873.24
Keenan Building	176,653.72
Martin Building	117,948.45
Pittsburg Terminal Properties	285,225.57
University Square No. 1	277,343.02
Pittsburgh Life Building	54,207.00*
Building 319 Fifth Avenue	57,190.00*
	$1,935,485.72

* Management commenced September 1964; rental income estimated.

206. That during the calendar years 1964, 1965, 1966 and 1967, and at all times subsequent thereto to present, the annual gross rental income collected by

Arnheim and Neely, Inc. from the above properties and/or those similarly situated, exceeded and now exceeds $1,000,000 per annum.

207. That in the years 1964 and 1965, the commissions received by the defendant from the activities aforementioned in paragraphs 202 and 203 approximated or exceeded $200,000, in the years 1966 and 1967, and at all times subsequent thereto to present approximated or exceeded $250,000, but at no time exceeded $500,000. Receipts from commissions on the sales of real property for others (and from sales of real property in their own name (approximated $62,000, $58,000, $90,000, and $68,000, during said years; commissions on the sales of insurance approximated $11,000, $16,000, $14,000, and $13,000, during said years. Commission rates on real property sales ranged from three per cent (3%) to ten per cent. (10%).

208. None of the buildings managed by Arnheim and Neely, Inc. are owned by it, with the exception that the defendant owns 50 shares out of 2850 shares in Pittsburgh Terminal Properties Corp. (the owner of the Pittsburgh Terminal Properties Building managed by the defendant).

209. That the management of the above properties by Arnheim and Neely, Inc. was conducted pursuant to and under the standard "Contract for Management" attached hereto as Exhibit 1, or one similar thereto, entered into between Arnhim and Neely, Inc. and the owners of the individual buildings.

210. All the activities of defendant Arnheim and Neely, Inc. as specified in the preceding paragraphs 203 through 209, and performed by the approximately 14 employees on the payroll of the defendant as noted

in paragraph 304(a) hereof, are related and performed through unified operation and common control and for a common business purpose by Arnheim and Neely, Inc. The parties are in disagreement as to whether the activities performed by other employees at the buildings managed by the defendant for separate owners are related activities performed through unified operation and common control and for a common business purpose.

311. Defendant stipulates and agrees that a number of employees employed in its home office were regularly and recurringly engaged in preparing and handling correspondence, remittances, billings, advertising materials, and other miscellaneous goods, including profit and loss statements, governmental reports, and real estate leases, a portion of which were transmitted to points outside the Commonwealth of Pennsylvania, and regularly and recurringly using channels and facilities of interstate communication such as telephones, telegraph, and United States mail in corresponding and communicating with persons and concerns located outside the Commonwealth of Pennsylvania.

III

301. Pursuant to the "Contract for Management" (Exhibit 1), the defendant conducts the management operations of the named buildings in the following manners:

a) All receipts collected by Arnheim and Neely, Inc. are deposited in separate accounts for each owner, which accounts are entitled, for example, "Arnheim and Neely, Inc., Buhl Building Account".

b) The funds deposited in these accounts are the property of the owner and not of Arnheim and

Neely, Inc., and Arnheim and Neely, Inc. is not liable in the event of bankruptcy or failure of the depository.

c) Expenses of a particular building, including payroll, equipment purchases, maintenance and repairs, utilities, janitorial supplies, insurance, management fees, and sometimes taxes, are paid out of the account established for the particular building by checks drawn and signed by a representative of Arnheim and Neely, Inc., as agent for the owner. Some expenses such as real estate taxes, major capital expenditures, mortgage payments and insurance premium payments are paid directly by some owners from their separate bank account with which Arnheim and Neely, Inc. has no connection.

d) All Social Security, tax and other governmental reports are signed in the name of the owner of the building by Arnheim and Neely, Inc. as agent.

e) Fees due Arnheim and Neely, Inc. for management and for securing leases are paid to Arnheim and Neely, Inc. from the appropriate account for the building in question by checks drawn and signed by officers of defendant Arnheim and Neely, Inc.

f) Periodically, generally at the end of each month, the balance of funds in each building account is returned to the owner by a check on the account drawn and signed by a representative of Arnheim and Neely, Inc. as agent.

g) Each building owner has separate employer's identification numbers for federal, state, and city payroll taxes. Separate payroll tax returns are prepared by Arnheim and Neely, Inc. and are filed in the name of each building owner individually under his identification number. The taxes are paid from the appropriate account by checks drawn and signed by

representatives of Arnheim and Neely, Inc., as agent. However, in a few instances, the individual owners prepare and file their own tax reports. In such cases, no payment would be made by Arnheim and Neely, Inc. from the appropriate account.

h) Separate income tax returns are prepared and filed by the owners of each building managed by Arnheim and Neely, Inc., which income tax returns reflect the business of the particular owner and not the income of Arnheim and Neely, Inc., except that the management commissions and leasing commissions paid to Arnheim and Neely, Inc. are deducted, with other expenses, from the owner's gross receipts to determine the owner's net income.

i) The rentals of the various tenants in the various buildings managed by Arnheim and Neely, Inc. were either established by a prior management or are fixed by the owner after receiving the recommendation of Arnheim and Neely, Inc.

j) Any loss suffered in connection with a building managed by Arnheim and Neely, Inc. is solely the loss of the owner of that building and not of Arnheim and Neely, Inc.; similarly as to profits and the benefits of any increase in profits, except that the commissions paid to Arnheim and Neely, Inc. increase or decrease in direct relation to the gross rentals of the building.

k) Arnheim and Neely, Inc. is compensated for its management responsibilities by the owner of the buildings by a percentage of the gross rentals, or in the instances of F. W. Woolworth Co. and University Square No. 1, Inc., on a flat fee basis.

302. Arnheim and Neely, Inc. also conducts the management and maintenance of the managed properties in the following manners:

a) Arnheim and Neely, Inc. investigates the references of all prospective tenants.

b) Arnheim and Neely, Inc. advertises the availability of rentals in the managed buildings. Typical examples are attached as Exhibit 2.

c) Arnheim and Neely, Inc. display signs upon the buildings for purposes of obtaining rentals. Typically such signs are worded "For Rent. Arnheim and Neely, Inc., Agents."

d) Arnheim and Neely, Inc., as agents and in the name of the owner, signs, renews and cancels leases for the premises or any part thereof. Sample copies of leases, renewals, cancellations, and correspondence related thereto are attached as Exhibits 3, 4, 5 and 6.

e) Arnheim and Neely, Inc. in many instances terminates tenancies as agent and in the name of the owner, and is empowered to sign and serve in the name of the owner such notices as are deemed needed by Arnheim and Neely, Inc.

f) Arnheim and Neely, Inc. as agent and in the name of the owner, frequently institutes and prosecutes actions to oust tenants, and to recover rents and other sums due; and, when expedient, compromises, settles, and releases such actions.

g) Arnheim and Neely, Inc. collects all rents from all tenants.

h) Arnheim and Neely, Inc. as agent and in the name of the owner, makes or causes to be made repairs and alterations and supervises same, and does the decorating on the managed premises.

i) Arnheim and Neely, Inc. as agent and in the name of the owner, makes the contracts and pays for all electricity, gas, fuel, water, telephone, window cleaning, ash hauling, vermin extermination, and any

other service required at the managed buildings. See Exhibit 7.

k) When a Contract for Management is terminated, Arnheim and Neely, Inc. draws a check on the appropriate owner's account for the balance, which check is sent to the owner and the owner's account closed.

l) There is some turn-over in the buildings managed by Arnheim and Neely, Inc., with some management accounts being lost and some new ones added periodically. When the management services of Arnheim and Neely, Inc. are terminated with respect to a particular building, the persons working in that building continue to work subject to the recommendation of a new real estate management firm which may take over the management of the building and approval of the owners of the building.

303. In the management and maintenance of the managed properties, Arnheim and Neely, Inc., at all times acting pursuant to their contracts with the building owners, engages in the following:

a) Arnheim and Neely, Inc. hires all labor and employees required for the operation and maintenance of the managed premises. The hiring and pay of the building superintendents are occasionally subject to approval of the building owners.

b) Arnheim and Neely, Inc. discharges all labor and employees required for the operation and maintenance of the managed premises.

c) Arnheim and Neely, Inc. supervises all labor and employees required for the operation and maintenance of the managed premises.

d) Arnheim and Neely, Inc. provides a managerial person (separate and apart from the building super-

intendent) in regard to most, if not all of the managed properties.

e) Arnheim and Neely, Inc. schedules the hours to be worked by all persons engaged at the managed properties.

f) Arnheim and Neely, Inc. determines the rates of pay of all employees engaged at the managed properties, subject to approval of building owners without exception. See Exhibit 8.

g) Arnheim and Neely, Inc. determines the method of payment of all persons engaged at the managed properties, subject to union agreement, if any.

h) Arnheim and Neely, Inc. establishes fringe benefits for all persons engaged at the managed properties, subject to owner's approval.

i) Arnheim and Neely, Inc. negotiates union contracts in regard to those persons engaged at the managed properties who are union members. Exhibit 9 attached is typical of such contracts.

j) Arnheim and Neely, Inc. prepares the payroll for all persons engaged at the managed properties.

k) All persons engaged at the managed properties are paid by means of Arnheim and Neely, Inc. checks, drawn on the appropriate owner's account.

l) Persons on Arnheim and Neely, Inc's staff are are assigned managerial responsibility for one or more of the particular buildings.

m) Arnheim and Neely, Inc., through its staff manager or through the building superintendent, assigns the persons engaged at the buildings to the various required duties and supervises the performance thereof.

n) Promotions or reductions in rank and increases or decreases in pay as to the persons engaged at the

managed buildings are determined by Arnheim and Neely, Inc., subject to owner's approval.

o) Arnheim and Neely, Inc. makes legal deductions, including Income Tax, Social Security, etc., from the pay checks of all persons engaged at the managed buildings.

p) The "Contract for Management" (Exhibit 1) provides, with respect to the managed buildings, "that all employees shall be deemed the employees of the OWNER and not the AGENT."

304. The business affairs of the defendant are in other respects conducted as follows:

a) Arnheim and Neely, Inc. maintains a central office at 615 Grant Building in Pittsburgh, Pennsylvania. Approximately fourteen (14) persons are employed by Arnheim and Neely, Inc. at this central office. These employees are engaged in various duties relating to the management of all the managed buildings. Most records, including, but not limited to, those pertaining to rental income and expenses, and the payroll for all persons engaged at all the managed buildings are maintained and kept at the said central office.

b) Some central office employees of Arnheim and Neely, Inc. are regularly and recurringly engaged in corresponding and communicating with tenants in managed buildings at their offices outside the Commonwealth of Pennsylvania, and leases, rentals, and other documents or goods are regularly transmitted to and received from such out of state offices of tenants; and some central office employees are also regularly and recurringly engaged in correspondence and communication with owners of managed buildings at their offices outside the Commonwealth of Pennsyl-

vania, and such correspondence and communication includes the receipt and transmittal of documents and goods such as leases, checks, profit and loss statements, and miscellaneous billings and remittances.

IV

In regard to the persons engaged in the maintenance, and supervision of such activities, at the managed properties, the following facts are stipulated to:

401. During the specified periods herein (stipulated facts following only relate to the inclusive period of December 15, 1963 to December 18, 1965, covered in the investigation by the Wage and Hour and Public Contracts Divisions), the following persons were engaged at the named buildings during the stated periods of time:

a) At the Buhl Building

Henry J. Oberle	12/31/63 - 12/15/65

b) At the Clark Building:

Theodore Hritako	9/14/65 - 10/12/65
Alex B. Taylor	7/13/65 - 10/19/65
Reuben P. Taylor	6/15/65 - 10/19/65

c) At the Eureka Savings Building:

Matthew Arrons	1/11/64 - 12/18/65
Charlotte Alston	5/30/64 - 12/18/65
Edward Anderson	5/30/64 - 12/18/65
Lester Deakles	1/11/64 - 11/27/65
Noel Ford	5/31/64 - 5/ 6/64
Robert Frashley	1/ 4/64 - 5/23/64
Martin Harrison	1/ 4/64 - 6/12/65
Elizabeth Mango	1/ 4/64 - 5/ 1/65
Jack Murphy	1/ 5/64 - 7/25/64
James Starks	1/ 4/64 - 12/18/65
Alice B. Taylor	1/ 4/64 - 5/ 1/65

d) At the Keenan Building:

Raymond Fields	12/18/63-7/ 8/64

e) At the Martin Building:

Blufus Evans	5/15/65-12/15/65
James Hickey	12/31/63-12/15/65
Stanley Mazanek	2/ 1/65- 4/30/65
Robert Rickers	12/31/63-12/15/65
Celestine Sanders	12/31/63-12/15/65
Samuel Sanders	9/ 3/64- 1/31/65
Richard R. Vargo	12/16/63-12/15/65

f) At the Pittsburgh Life Building:

Ruth Baer	8/31/65- 9/15/65
Ernest Bengal	9/15/64-12/31/64
Edward Cholewinski	11/15/64-12/15/65
Ruth Harkins	9/15/64-12/15/65
Kenneth Nixon	9/15/64- 8/20/65
Philomena Lacivita	9/ 1/64-12/15/65
Jesse Magana	6/15/65-12/15/65
Thomas Zapf	9/16/64- 6/15/65

g) At the 319 Fifth Avenue Building:

William Crowley, Jr.	9/15/64-12/15/65
Ronald Duffet	9/15/64-12/15/65
James Lightfoot	9/15/64-12/15/65
Arthur Schmiat	9/15/64-11/20/65

* * * * *

403. If the legal questions presented in this matter are resolved in the affirmative, there will be violations of the minimum wage provisions of Section 6 of the Act in regard to:

a) The Eureka Savings Building to employees:

1. Charlotte Alston
2. Edward Anderson

2. Noel Ford
4. James Starks
5. Lester Deakles
6. Martin Harrison
7. Elizabeth Manago
8. Alice Taylor

b) The Martin Building to employees:

1. Celestine Sanders

c) The Pittsburgh Life Building to employees:

1. Kenneth Nixon
2. Ruth Baer
3. Philomena Lacivita
4. Ruth Harkins
5. Jesse Magana
6. Thomas Zapf

d) The 819 Fifth Avenue Building to employees:

1. William Crowley, Jr.
2. Donald Duffett
3. Arthur Schmiat
4. James Lightfoot

404. If the legal questions presented in this matter are resolved in the affirmative, there will be violations of the overtime provisions of Section 7 of the Act in regard to:

a) The Buhl Building to employees:

1. Henry Oberle

b) The Clark Building to employees:

1. Theodore Hritako
2. Alex C. Taylor
3. Boden P. Taylor

c) The Eureka Building to employees:

1. Manther Aarons
2. Robert Freshley
3. Martin Harrison
4. Jack Murphy
5. Alice Taylor
6. Edward Anderson
7. James Starks

d) The Keenan Building to employees:

1. Raymond Fields

e) The Martin Building to employees:

1. Blufus Evans
2. James Hickey
3. Stanley Mazanek
4. Robert Rickers
5. Samuel Sanders
6. Celestine Sanders
7. Richard Vargo

f) The Pittsburgh Life Building to employees:

1. Edward Cholewinski
2. Ernest Bengal
3. Ruth Baer
4. Philomena Lacivita
5. Kenneth Nixon
6. Jesse Magana
7. Ruth Harkins

g) The 319 Fifth Avenue Building to employees:

1. William Crowley, Jr.
2. Ronald Duffet
3. James Lightfoot
4. Arthur Schmiat

* * * * *

407. In regard to the records maintained by Arnheim and Neely, Inc. the following facts are stipulated to:

a) The hours worked by the approximately 14 employees at the subject's main office were not recorded either as to daily or weekly hours.

b) The scheduled hours which the maintenance personnel at the various buildings were to work were recorded. However, the actual hours worked were not recorded for numerous employees, and said actual hours differed from the scheduled hours as to the following employees at the following buildings:

1. Buhl Building—Henry J. Oberle.

2. Eureka Building—Charlotte Alston, Edward Anderson and Lester Deakins

3. The Martin Building—Richard Vargo.

4. The Pittsburgh Life Building—Ernest Bengal, Kenneth Nixon, Edward Cholewinski, Ruth Harkins and Philomena Lacivita.

5. The 312 Fifth Avenue Building—William Crowley, Jr., Ronald Duffett, James Lightfoot and Arthur Schmiat.

V

501. The persons employed in the maintenance of the managed buildings in issue herein engaged in the following activities:

a) Buhl Building

1. Sally Lewichi was regularly and recurringly, daily and with more frequency as part of her assigned duties, engaged (a) in the operation of an elevator carrying mailmen delivering mail and parcel post to

the tenants throughout the building, and (b) in personally carrying light parcels to tenants throughout the building, some portion of the aforementioned goods originating outside the Commonwealth of Pennsylvania.

2. Henry Oberle, building superintendent, as part of his assigned duties, personally engaged in carrying parcels to tenants throughout the building, a portion of said parcels originating outside the state; and in supervising the aforementioned employee Lewicki.

b) Clark Building

1. Two employees engaged at the said building were regularly and recurringly, daily and with more frequency as part of their assigned duties, engaged in operating elevators (a) carrying mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which named goods originated outside the Commonwealth of Pennsylvania.

2. Some other employees at the said building were engaged in maintenance work.

c) Eureka Savings Building

1. Charlotte Alston was regularly and recurringly, as part of her assigned duties, daily and with more frequency, engaged in (a) the operation of an elevator carrying mailmen delivering mail and parcel post to the tenants throughout the building, and (b) transporting deliverymen carrying packages to be distributed throughout the said building to tenants in the building, a portion of which named goods originated outside the Commonwealth of Pennsylvania.

2. Edward Anderson was regularly and recurringly, as part of his assigned duties, daily and with more frequency, engaged (a) in the operation of an elevator carrying mailmen delivering mail and parcel post to the tenants throughout the building, and (b) in operating a freight elevator carrying packages, crates and boxes containing merchandise to be distributed throughout the said building to tenants in the building, a portion of which named goods originated outside the Commonwealth of Pennsylvania.

3. Lester Deakles was regularly and recurringly, as part of his assigned duties, daily and with more frequency, engaged (a) in the operation of an elevator carrying mailmen delivering mail and parcel post to the tenants throughout the building, and (b) in operating a freight elevator carrying packages, crates and boxes containing merchandise to be distributed throughout the said building to tenants in the building, a portion of which named goods originated outside the Commonwealth of Pennsylvania.

4. Noel Ford was regularly and recurringly, as part of his assigned duties, daily and with more frequency, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

5. James Starke was regularly and recurringly, as part of his assigned duties, daily and with more frequency, engaged in operating freight elevators carrying merchandise in packages, crates or boxes to be distributed throughout the building to tenants in the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

6. Freight service as referred to in subparagraphs 1, 2 and 5 above is a customary service rendered to tenants in said buildings.

7. Some other employees at the said building were engaged in maintenance work.

d) Keenan Building

1. George Langsdale operated a freight elevator on a regular and recurring basis, daily and with more frequency as part of his assigned duties, (a) carrying freight brought to the building for tenants in the building, a portion of which came in from out of state, and (b) carrying freight from tenants in the building destined for shipment outside the Commonwealth of Pennsylvania.

2. Edward Gift was regularly and recurringly, daily and with more frequency as part of his assigned duties, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

3. Freight service as referred to in subparagraph 1 above is a customary service rendered to tenants in said building.

4. Some other employees at the said building were engaged in general maintenance work.

e) The Martin Building

1. Celestine Sanders was regularly and recurringly, daily and with more frequency as part of her assigned duties, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen

delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

2. Richard R. Vargo operated the freight elevator on a regular and recurring basis, daily and with more frequency as part of his assigned duties, carrying freight brought to the building to tenants in the building, a portion of which comes in from out of state.

3. Freight service referred to in subparagraph 2 above is a customary service rendered to tenants in said building.

4. Some other employees at the said building were engaged in general maintenance work.

(f) Pittsburgh Life Building

1. Ruth Baer regularly and recurringly, daily and with more frequency as part of her assigned duties, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

2. Ruth Harkins regularly and recurringly, daily and with more frequency as part of her assigned duties, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

3. Philomena Lacivita regularly and recurringly, daily and with more frequency, as part of her as-

signed duties, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen carrying packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

4. Kenneth Nixon, as part of his assigned duties, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

5. Ernest Bengel regularly and recurringly, daily and with more frequency, as part of his assigned duties, supervised elevator operators (a) transporting in elevators mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

6. Edward Cholewinski supervised the elevator operators and other employees as part of his assigned duties.

7. Some other employees employed at the said building engaged in general maintenance work.

g) 319 Fifth Avenue Building

1. William Crowley, Jr., regularly and recurringly, daily and with more frequency as part of his assigned duties, engaged (a) in operating an elevator carrying 1) mailmen delivering mail and parcel post to the tenants throughout the building, and 2) de-

liverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania, and (b) in operating the freight elevator carrying freight brought to the building for distribution to tenants in the buildings, a portion of all named goods originated out-of-state and (c) in carrying freight from tenants in the building destined for shipment outside the Commonwealth of Pennsylvania.

2. Ronald Duffett regularly and recurringly, daily and with more frequency as part of his assigned duties, engaged in (a) operating an elevator carrying 1) mailmen delivering mail and parcel post to the tenants throughout the building, and 2) deliverymen delivering packages to various tenants throughout the building, (b) in operating a freight elevator carrying freight brought to the building for distribution to tenants in the building, a portion of all named goods originating out-of-state, and (c) in carrying freight from tenants in the building destined for shipment outside the Commonwealth of Pennsylvania.

3. Arthur Schmist regularly and recurringly, daily and with more frequency as part of his assigned duties, engaged in (a) operating an elevator carrying 1) mailmen delivering mail and parcel post to the tenants throughout the building, and 2) deliverymen delivering packages to various tenants throughout the building, (b) in operating a freight elevator carrying freight brought to the building for distribution to tenants in the building, a portion of all named goods originated out-of-state, and (c) in carrying freight from tenants in the building des-

tined for shipment outside the Commonwealth of Pennsylvania.

4. Freight service as referred to in subparagraphs 1, 2, and 3 above is a customary service rendered to tenants in said building.

5. Some other employees employed at the said building engaged in general maintenance work.

502. The persons employed in the maintenance of the managed buildings in issue herein regularly and recurringly, daily and with more frequency, handle goods and work with goods that have been moved from points outside the Commonwealth of Pennsylvania, including such goods as soap, detergent, waxes, and light bulbs.

503. A number of employees of Arnheim and Neely, Inc. at the central office in the Grant Building engage on a regular and recurring basis, as part of their assigned duties, daily and with more frequency, in the following activities:

a) Preparing and transmitting correspondence to out-of-state persons and concerns.

b) Making telephonic communications with out-of-state persons or concerns.

c) Preparing and transmitting documents such as leases, checks, profit and loss statements, etc., to out-of-state persons and concerns.

d) Receiving correspondence from out-of-state persons and concerns.

e) Receiving telephonic communications from out-of-state persons and concerns.

f) Receiving documents, such as leases, profit and loss statements, etc. from out-of-state persons and companies.

CHARLES DONAHUE
Solicitor of Labor

LOUIS WEINER
Regional Attorney

MARSHALL H. HARRIS
Deputy Regional Attorney
United States Department of Labor

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Attorney for Intervenor

[Filed Dec. 19, 1968]

EXHIBIT 1

CONTRACT FOR MANAGEMENT

In consideration of the covenants herein contained, _____

_____

_____

(hereinafter called "OWNER") and ARNHEIM & NEELY, INC. (hereinafter called "Agent"), agree as follows:

1. The OWNER hereby employs the AGENT exclusively to rent, lease, operate and manage the property known as: _____

_____

_____

_____

upon the terms hereinafter set forth for the period of _____ beginning on the ____ day of _____ 19__, and ending on the ____ day of _____ 19__, and thereafter from year to year, unless on or before sixty (60) days prior to the date last above mentioned, or on or before thirty (30) days prior to the expiration of any such renewal period, either party hereto shall notify the other in writing of an intention to terminate this agreement in which case this agreement may be thereby terminated on the last mentioned date.

2. The AGENT agrees:

A. To accept and does hereby accept the management of the said premises for the period and upon the terms herein provided, and agrees to furnish the services of its organization for the renting, operating and managing of said premises.

B. To investigate carefully all references of prospective tenants.

C. To aid, assist and co-operate in the matter of real property taxes and insurance loss adjustments, and to perform such duties in connection therewith as may be requested by the OWNER.

D. To care for, place and supervise, subject to OWNER'S instructions, all insurance coverage.

E. To render monthly statements to the OWNER, not later than the ____ day of each month, remitting the amount collected during the previous month, less disbursements made on behalf of and for the account of OWNER, AGENT may withhold a sum not to exceed $_____ as a reserve to meet obligations which will or may become due thereafter and for which current income will not or may not be adequate.

F. To deposit all receipts collected for OWNER (less any sums properly deducted as otherwise provided herein) in a Trust Account, separate from AGENT'S personal account. However, AGENT will not be held liable in event of bankruptcy or failure of a depository.

G. AGENT'S employees who handle or are responsible for OWNER'S monies shall be bonded by a fidelity bond.

H. To account to the OWNER for all rebates and/or discounts that AGENT may receive on account of expenditure or contracts for the account of said premises and all such rebates and/or discounts shall accrue to the benefit of the OWNER.

I. _____

_____

_____

_____

_____

3. The OWNER hereby gives the AGENT the following authority and powers, and agrees to assume all expense incurred in connection therewith:

A. To advertise the availability for rental of the herein described premises or any part thereof for rent provided, however, that such expenditures shall not in the aggregate exceed $_____ in any one year period; to display signs thereon; to sign, renew and/or cancel leases for premises or any part thereof, with express authority in the AGENT to sign leases for terms not in excess of _____ years; to terminate tenancies and to sign and serve in the name of the OWNER such notices as are deemed needful by AGENT; to institute and prosecute actions to oust tenants and recover possession; to sue for in the name of the OWNER and recover rents and other sums due; and, when expedient, to settle, compromise and release such actions or suits or reinstate such tenancies.

B. To collect rents due or to become due and give receipts therefor.

C. To make or cause to be made and supervise repairs and alterations and to do decorating on the premises; to purchase supplies and pay all bills. The AGENT agrees to secure the ap-

proval of the OWNER on all expenditures in excess of $_____ for any one item, except monthly or recurring operating charges, and/or emergency repairs in excess of the maximum, if in the opinion of the AGENT, such repairs are necessary to protect the property from damage or to maintain services to the tenants as called for by their tenancy.

D. To hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises; it being agreed that all employees shall be deemed the employees of the OWNER and not the AGENT, and that the AGENT may perform any of its duties through its attorneys, agents or employees and shall not be responsible for their acts, defaults or negligence if reasonable care has been exercised in its appointment and retention. The AGENT shall not be liable for any error of judgment or for any mistake of fact of law, or for anything which it may do or refrain from doing hereunder, except in cases of willful misconduct or gross negligence.

E. To make contracts for electricity, gas, fuel, water, telephone, window cleaning, ash hauling, vermin extermination and other services or such of them as the AGENT shall deem advisable; the OWNER to assume the obligation of any contract so entered into at the termination of this agreement.

_____

_____

_____

4. The OWNER further agrees:

A. To save the AGENT harmless from all damage suits and costs incurred therefrom in connection with the management of the premises and from liability from injuries suffered by any employee or other person whomsoever and to carry, at his own expense, necessary liability and compensation insurance adequate to protect the interest of the parties hereto, which policies shall be so written as to protect the AGENT in the same manner and to the same extent as the OWNER.

B. To advise the AGENT in writing if payment of mortgage indebtness, property or employee taxes, special assessments or the placing of fire, liability, steam boiler or any other insurance is desired.

C. Upon and after the termination of this agreement pursuant to the method described in Paragraph 1 hereof, OWNER shall recognize AGENT as the broker in any pending negotiations for the leasing of said premises, or any part thereof, and in the event of the consummation thereof OWNER shall pay to AGENT a commission therefor at the rate prescribed in Paragraph 4, Subsection E(2) hereof.

D. To give the AGENT the authority, and agree to assume the expense incurred in connection therewith, to provide, equip and maintain a suitable office in the premises, if deemed advisable by the AGENT. The location of such office and the expenses of equipping and maintaining same shall be subject to the OWNER's approval.

E. To pay the AGENT each month:

(1) FOR MANAGEMENT: _____ per cent of the gross amount of money received from the operation of said premises during the period herein provided.

(2) FOR LEASING: _____ per cent of the total consideration of the lease on all leases to new tenants secured, and _____ per cent for renewals of leases during the period herein provided for, payable in cash on signing of the lease.

(3) FOR SUPERVISION OF REPAIRS: _____

_____

_____

F. Special clauses _____

_____

_____

_____

5. The OWNER hereby instructs the AGENT to pay, out of the rents collected from the premises, the following items of expense other than normal operation expense: _____

_____

_____

_____

6. This agreement is entered into by and between the OWNER and AGENT, and shall be binding upon the successors and assigns of the AGENT, and the heirs, executors, administrators, successors and assigns of the OWNER.

IN WITNESS WHEREOF the parties hereto have affixed or caused to be affixed their respective signatures this ____ day of _____ 19__.

WITNESS:

_____ _____

_____ _____

_____ _____

_____ _____

OWNER.

ARNHEIM & NEELY, INC.

_____

President Secretary

AGENT.

CONTRACT FOR MANAGEMENT

between

OWNER

and

ARNHEIM & NEELY, INC.

For property located at

_____

_____

Beginning _____ 19__

Ending _____ 19__

Exhibit 9

AGREEMENT

THIS AGREEMENT made the 18th day of March, 1965, by and between 701 LIBERTY AVENUE REALTY COMPANY, a partnership, owner and operator of the Clark Building, by ARNHEIM & NEELY, INC., agent, hereinafter referred to as the "EMPLOYER",

and

LOCAL UNION No. 5, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, hereinafter referred to as the "UNION".

WITNESSETH:

1. The Employer recognizes the Union as the exclusive representative of the electrical workers in the employ of the Clark Building.

2. The Employer agrees to employ at least one (1) journeyman electrician as an electrical maintenance man, and as many additional journeyman electricians as may be needed from time to time.

3. (a) Effective January 1, 1965, the wages of the journeyman electrician shall be $4.425 per hour or $177.00 per week. If additional electrical maintenance men are employed, the wages of such additional men shall be $4.25 per hour or $170.00 per week.

(b) Effective January 1, 1966, the wages of the journeyman electrician shall be $4.575 per hour or $183.00 per week. If additional electrical maintenance men are employed the wages of the additional men shall be $4.40 per hour or $176.00 per week.

4. The regular work week shall be eight (8) hours per day, five (5) days per week, Monday to Friday inclusive, or a total of forty (40) hours per week. All work in excess of 40 hours per week shall be paid at the rate of time and one-half.

5. The electrical maintenance men shall be paid for, but shall not be required to work on, the following holidays:

New Year's Day	Labor Day
Memorial Day	Thanksgiving Day
Fourth of July	Christmas Day

6. If extra electrical workers are hired as maintenance men, the Employer shall pay for said work at the rate set out in paragraph 3 hereof if continuously employed for at least three (3) months. If, however, dismissed sooner than in three (3) months, these men shall be paid at the prevailing hourly rate for journeyman electrical workers.

7. Electrical maintenance men shall receive two (2) weeks' vacation with pay, provided the employee has been in the service of the Employer for at least one (1) year.

8. It is agreed that in accord with the National Employees Benefit Agreement entered into between the National Electrical Contractors Association and the International Brotherhood of Electrical Workers on September 3, 1946, as amended, that unless authorized otherwise by Article 5, Section 2(b) of the National Employees Benefit Agreement the individual employer will forward monthly to the designated Local Employees Benefit Board an amount equal to 3% of his gross monthly labor payroll, which he is obligated to pay to the employees in this bargaining

unit, and a complete payroll report prescribed by the National Board. The payment shall be made by check or draft and shall constitute a debt due and owing to the National Board on the last day of each calendar month, which may be recovered by suit initiated by the National Board or its assignee. The payment and the payroll report shall be mailed to reach the office of the appropriate Local Board not later than seven (7) calendar days following the end of each calendar month.

In the event the Employer is authorized by Article 5, Section 2(b) of the National Employees Benefit Agreement to make the required payments on a time basis other than the monthly basis previously stated, such Employer shall be obligated by this Agreement to comply with the provisions of the said Article 5, Section 2(b) of the National Employees Benefit Agreement.

Individual employers who fail to remit as provided above shall be additionally subject to having this Agreement terminated upon seventy-two (72) hours' notice in writing being served by the Union, provided the individual employer fails to show satisfactory proof that the required payments have been paid to the Local Employees Benefit Board.

The failure of an individual employer to comply with the applicable provisions of the National Employees Benefit Agreement shall also constitute a breach of this labor agreement.

9. This Agreement shall be effective beginning January 1, 1965, and shall continue in force for two (2) years, until December 31, 1966.

701 LIBERTY REALTY COMPANY,
a partnership

by ARNHEIM & NEELY, INC., Agent

LOCAL UNION NO. 5,
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

AGREEMENT

EXHIBIT 9

THIS AGREEMENT made and entered into this 22 day of December, 1964 to be effective as of December 1, 1964, by and between BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 29, AFL-CIO, hereinafter called the "Union."

AND

UNIVERSITY SQUARE NO. 1, INC., a Pennsylvania Corporation, hereinafter called the "Employer."

WITNESSETH:

WHEREAS, the parties hereto desire to establish a standard of wages and conditions under which members of the Union shall work for the Employer during the term of this Agreement; and

WHEREAS, the members of the Union have bound themselves together to conform and comply with the existing by-laws, regulations and rules of the Building Service Employees International Union for their welfare and benefit; and

WHEREAS, it is the intention of both parties hereto to mutually agree upon certain salutary terms and provisions to guide in the amicable and beneficial execution of this contract, realizing it to be the best method of creating a thorough understanding between employer and employee;

NOW, THEREFORE, in consideration of the above, both parties mutually agree to the following:

FIRST: The Employer does hereby recognize and acknowledge the above stipulated Union as the true and only representative of the employees involved herein, as set forth in Exhibit "A" attached to this Agreement, and does admit precedence of this contract as the governing factor over the within named employees, and does hereby declare that during the life of this contract it will not enter into a contract for the same employees with other unions who may claim jurisdiction over the employees within named, providing this clause does not conflict with any State or Federal statute, or any adjudication by any court of law.

SECOND: The Employer agrees that in the building operated by UNIVERSITY SQUARE No. 1, INC., known as University Square No. 1, located at 4625 Fifth Avenue, Pittsburgh, Pennsylvania, it will employ and continue in its employment, for the employees covered by this Agreement, during the period covered by this Agreement, only members of Local No. 29 in good standing. In the event the Union is called upon and does not furnish workers satisfactory to the Employer, the Employer may employ other than a union member, who must, however, become a member of the Union within two (2) weeks, and such worker shall not be denied membership except for just cause. Employer reserves the right to determine who is a satisfactory employee.

(a) For the purpose of this Agreement, it is understood that when a member is suspended or expelled by the Union, and written notification of such action is received by the Employer, such employee is to be regarded as not in good standing and subject to immediate discharge by the Employer.

THIRD: It is agreed that the wages and hours herein noted and made part of this Agreement in Exhibit "A" hereof shall be regarded as minimum wages and hours and this Agreement shall not interfere with any employee receiving higher wages than the minimums contained in this contract.

(a) Effective December 1, 1964, there shall be a general wage increase of three and one-half (3½%) per cent.

(b) Effective December 1, 1965, there shall be a general wage increase of five (.05¢) cents per hour.

(c) Effective December 1, 1966, there shall be a general wage increase of five (.05¢) cents per hour.

(d) In addition to the cash wages as specified in Exhibit "A" the Employer agrees to provide certain insurance benefits for all full-time union employees as herein noted and made part of this Agreement and marked Exhibit "B".

FOURTH: The work schedules shall be so arranged that no employee shall work more than eight (8) hours in any given day, except as otherwise herein provided.

(a) There shall be no spreading of work hours. The hours must be consecutive, excepting lunch periods.

(b) A one (1) hour lunch period shall be provided, exclusive of the number of hours worked in any given day, except in cases where the practice of a shorter lunch period is in force.

(c) Employees shall be scheduled on a five (5) day week basis; however, days off need not be consecutive. The Employer shall have the right in each instance to fix schedules.

FIFTH: The work week shall consist of forty (40) hours work, and time and one-half shall be paid for all hours worked in excess of forty (40) hours per week or eight (8) hours in one day. There shall be no pyramiding of overtime hours.

SIXTH: Salaries shall be paid semi-monthly.

SEVENTH: All privileges, benefits or prerogatives previously enjoyed by an employee prior to the introduction of this Union Agreement shall remain intact and in full force and no employee shall at any time suffer as a result of this Agreement.

(a) It is also understood and agreed that a high standard of efficiency of service in the building must be maintained.

(b) Work rules and regulations promulgated by the management shall be posted in the manager's office and a copy also shall be delivered to each employee whenever any such rules or regulations are promulgated. Work rules shall not be inconsistent with the terms and provisions of this Agreement.

EIGHTH: The Employer is empowered to hire and has the right to discharge any employee for just cause. Dishonesty and intoxication shall be deemed among the causes sufficient for dismissal without hearing, as hereinafter provided. The Union recognizes the right of Management to direct and control the policies of Management, so long as those policies do not violate any provisions of this Agreement.

NINTH: No change shall be made from men to women, or vice versa, except with the consent of the Union.

TENTH: The Employer shall have the right to determine the number and character of positions to be filled by employees. In case of layoffs, departmental seniority shall be followed with due consideration for competency and the efficiency and the special needs of the departments involved.

a) Consideration shall be given to those already employed in filling vacancies, based on seniority, with due consideration for training, ability, competency, efficiency and appearance for the particular job.

ELEVENTH: Holidays shall be granted to regular employees as follows: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

(a) For the purpose of the preceding paragraph, skeleton crews reporting for work on the holidays named herein shall receive an additional day's pay at the prevailing rate.

(b) When one of the above designated holidays falls on Sunday, it will be observed on the following Monday and not on Sunday.

(c) Any regular full time employee whose regular day off falls on a holiday shall receive an additional day's pay therefor, or, at the option of the Employer, shall receive an extra day off within the holiday week.

(d) If a holiday falls within the employee's vacation period, he shall receive the holiday pay or an additional day off at the option of the Employer.

TWELFTH: Employees who have worked continuously for one (1) year and less than two (2) years shall receive one week's vacation with full pay. Employees who hav worked continuously for two (2)

years and less than ten (10) years shall receive two (2) week's vacation with full pay. Employees who have worked continuously for ten (10) years or more, shall receive three (3) week's vacation with full pay. Such vacations shall be taken between May 1st and September 30th of each year unless otherwise agreed upon.

THIRTEENTH: If a grievance should arise, the employee shall take same up with his shop-steward. The shop-steward shall refer the grievance to the foreman or head of the department involved. If the matter is not adjusted to the complainant's satisfaction, he may appeal to the manager of the building.

(a) The employee involved in the dispute may carry his case to the Union if the decision rendered is not satisfactory.

(b) The Union shall use the following medium in an effort to arbitrate the dispute involved. A duly authorized representative of the Union shall meet with the representative of the Employer in an effort to further adjust the controversy. If the representatives so constituted are unable to agree on a decision, a third person shall be selected by the representative of the Union and the representative of the Employer, who shall be a disinterested party and whose awards shall be binding and final on both parties. In the event any costs are incurred in such arbitration, each party hereto agrees to assume and pay one-half of such costs so incurred, without reference to the decision rendered by said arbitrator.

FOURTEENTH: It is expressly agreed that the employee filling the position of foreman in the building shall not be an employee covered by the terms of this

Agreement; provided, however, that at any time hereafter the Employer may require such employee to come within the coverage of this Agreement.

FIFTEENTH: Initiation fees and dues shall be deducted from the pay of each employee by the Employer and shall be remitted to the Secretary-Treasurer or duly authorized representative of the Union. Same shall be accompanied by a list of employees from whom the deductions were made and shall be remitted to the Union not later than the fifteenth (15th) day of the current month. The Union agrees that it will furnish each employee with a receipt acknowledging payment of said dues or initiation fees. Employees shall be required as a condition of employment to furnish authorization to the Employer to make deductions as hereinbefore set forth.

SIXTEENTH: Any employee who is called for service as a juror shall be excused from work for the days on which he serves, and he shall receive for each such day of jury service on which he otherwise would have worked the difference between eight times his hourly base rate and the payment he receives for jury service, up to a limit of eight hours per day and forty hours per week. The employee shall present proof of service and the amount of pay received therefore.

SEVENTEENTH: In the event of the death of the wife, husband, son, daughter, parent, brother or sister of any employee covered by this Agreement who has been in the employ of the Employer for at least ninety (90) days, the employee shall be paid his regular straight time rate for scheduled time lost from work up to but not to exceed three (3) days of not more than eight (8) hours each, it being understood

that payment for such lost time off may include but not extend beyond the day after burial if the day after burial is a work day; and further, provided, the employee attends the funeral and furnishes proof thereof, if requested by the Employer.

EIGHTEENTH: No employee or applicant for employment covered by this Agreement shall be discriminated against because of membership in the Union or activities on behalf of the Union. Neither the Employer nor the Union shall discriminate for or against any employee or applicant for employment, covered by this agreement, on account of race, color, religious creed or national origin.

NINETEENTH: The employer shall inform all employees at the time of hire of the existence and terms of this Agreement and the obligations of such employee as to Union membership. The Employer agrees, within thirty (30) days of the date of hiring, to notify the Union of the name, address and classification of occupation of each such person so hired.

TWENTIETH: This Agreement shall continue from its effective date of December 1, 1964 until November 30, 1967, and it is mutually agreed there will be no strike or lockout for any reason whatsoever during the specified term thereof. It is also understood and agreed that:

In the case of emergencies such as flood, fire, etc., the terms of this Agreement shall not apply in connection with such measures as the Employer may deem it necessary to take for the protection of the building and afterward to put it into condition for occupancy.

IN WITNESS WHEREOF and to duplicate hereto of like tenor and effect, the parties hereto have hereunto affixed their hands and seals the day and year first above written.

UNIVERSITY SQUARE NO. 1, INC.
Arnheim & Neely, Inc., Agents

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 29, AFL-CIO

Exhibit "A"

Wage Schedule

Effective December 1, 1964 to November 30, 1967

Between

University Square No. 1, Inc.

and

Building Service Employees International Union, Local No. 29, AFL-CIO

CLASSIFICATION	MONTHLY WAGES EFFECTIVE		
	12-1-64	12-1-65	12-1-66
*Housemen	$314.95	$328.60	$332.25

Approved:

University Square No. 1, Inc.
Arnheim & Neely, Inc., Agents

Building Service Employees International Union, Local No. 29, AFL-CIO

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* Housemen shall have such general duties as are assigned to them by the manager of the corporation's apartment building that may be necessary or incidental to the proper maintenance, cleaning and upkeep of the building and grounds, including without limiting the generality of the foregoing, such garage duties, including car washing and polishing as may be assigned to them.

Exhibit "B"

University Square No. 1, Inc.

INSURANCE BENEFITS

Life Insurance—Male	$3,000.00
Accidental Death and Dismemberment Insurance—Male	$3,000.00
Life Insurance—Female	$1,500.00
Accidental Death and Dismemberment Insurance—Female	$1,500.00
Hospital—Room and Board (70 days)	$ 12.00 per day
Hospital—Special charges expense insurance	$ 420.00
Surgical expense insurance	$ 300.00
Ambulance expense insurance	$ 20.00
Polio expense insurance	$5,000.00
Weekly sick benefits—(13 weeks)	$ 30.00 per week
In-hospital medical care	$ 5.00 per day

[Caption Omitted]

ORDER

By agreement of the parties, the motion of The Institution of Real Estate Management of the National Association of Real Estate Boards to intervene is hereby granted, with the understanding that litigation will not be extended beyond the facts relating to the business operations of defendant Arnheim and Neely, Inc. during the relevant period.

It is so ordered this 13th day of January, 1969.

JOHN L. MILLER,
United States District Judge

[Caption Omitted]

ORDER TO SUBSTITUE PARTY PLAINTIFF

Upon motion by attorney for the plaintiff, it is hereby ORDERED that George P. Shultz, Secretary of Labor, United States Department of Labor, be substituted as Party Plaintiff in the above captioned action, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

GEORGE J. WEBER,
United States District Judge

[Filed Feb. 12, 1969]

[Caption Omitted]

MOTION FOR SUMMARY JUDGMENT

Plaintiff, George P. Shultz, Secretary of Labor, United States Department of Labor, in accordance with Rule 56 of the Federal Rules of Civil Procedure, moves this Honorable Court to grant summary judgment to plaintiff against defendant Arnheim and Neely, Inc. and Intervenor, The Institute of Real Estate Management of the National Association of Real Estate Boards, on the ground that the stipulation of the parties filed herein and the pleadings show that no genuine issue of material fact exists in this case and that the plaintiff is entitled to judgment as a matter of law.

[Filed March 20, 1969]

HAROLD C. NYSTROM
Acting Solicitor of Labor

LOUIS WEINER
Regional Attorney

MARSHALL H. HARRIS
Deputy Regional Attorney
United States Department
of Labor

GUSTAVE DIAMOND
United States Attorney
Attorneys for Plaintiff

[Caption Omitted]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Now come Arnheim and Neely, Inc., Defendant herein, by its attorneys, Eugene B. Strassburger, Jr., and Strassburger & McKenna, and The Institute of Real Estate Management of The National Association of Real Estate Boards, Intervener herein, by its attorneys, Frank L. Seamans and Eckert, Seamans & Cherin, and hereby move your Honorable Court for summary judgment in favor of Defendant, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, and in support thereof represent as follows:

1. The record before the Court on which the within Motion is based consists of the pleadings and stipulations of fact entered into by and between the parties to this action. Said stipulations have been filed with the Court and are a matter of record.

2. The moving parties submit that on the aforesaid record there are no substantial issues of fact to be determined or in dispute, and that said record

shown that Defendant is entitled to judgment in its favor as a matter of law.

EUGENE B. STRASBURGER, JR.
Strasburger & McKenna,

Attorneys for Defendant,
Arnheim & Neely, Inc.

FRANK L. SEAMANS,
Eckert, Seamans & Cherin,

Attorneys for Intervener, The Institute of Real Estate Management Of The National Association of Real Estate Boards.

[Filed April 9, 1969]

OPINION

[Caption Omitted]

MILLER, D.J.

By his Complaint, plaintiff, Secretary of Labor of the United States Department of Labor, seeks injunctive relief to enjoin alleged violations of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 251(a)(2), 215(a)(5).

Defendant, Arnheim and Neely, Inc., is a Pennsylvania corporation engaging in real estate management, brokerage sales, real estate appraisals, insurance sales, and miscellaneous other real estate management activities. It answered the Complaint denying salient allegations thereof.

On January 17, 1968, the Institute of Real Estate Management of the National Association of Real Estate Boards filed a motion to intervene as a defendant under Rule 24 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 24. On January 13, 1969, "[b]y agreement of the parties," the Court granted the Motion" . . . with the understanding that litigation will not be extended beyond the facts relating to the business operations of defendant Arnheim and Neely, Inc. during the relevant period." Intervener answered the Complaint on January 17, 1968, denying salient allegations thereof.

On December 19, 1968, the parties filed a lengthy stipulation [hereinafter abbreviated "Stip."].[1] On

[1] Although the Stipulation was filed prior to the Order granting leave to intervene, the Stipulation was executed by counsel for intervener.

March 20, 1969, plaintiff moved for summary judgment "... on the ground that the stipulaton of the parties filed herein and the pleadings show that no genuine issue of material fact exists ... and that the plaintiff is entitled to judgment as a matter of law." On April 9, 1969, defendant and intervenor moved for summary judgment asserting lack of a contested factual issue and demanding judgment as a matter of law.[1]

According to the Stipulation, defendant, since January 1, 1968, has managed nine buildings in the Greater Pittsburgh area.[2] [Stip. ¶ 204] Defendant owns none of these buildings. [Stip. ¶ 208][3] Its rentals and sales are performed by approximately fourteen employees on defendant's payroll. [Stip. ¶ 210] The case at bar concerns "persons employed in maintenance, custodial and operational activities at the buildings managed by the defendant. ..." [Stip. ¶ 2]

The Stipulation sets forth issues formulated from the pleadings. [Stip. ¶¶ 1-8] This Opinion will review these issues of law so tendered.

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[1] The following were also filed: "Plaintiff's Brief in Support of Summary Judgment"; "Defendants' Brief in Support of Summary Judgment", filed jointly by defendant and intervenor; and Plaintiff's "Reply Brief in Support of Summary Judgment."

[2] Defendant maintains its principal office and place of business in the Grant Building, Pittsburgh, Pennsylvania. [Stip. ¶ 201]

[3] Defendant owns 50 of 2850 shares of a corporation which owns one of the buildings. [Stip. ¶ 208]

Issue

"Are the various persons employed in maintenance, custodial and operational activities at the buildings managed by the defendant 'employees' of the defendant within the meaning of the Act?" [Stip. ¶ 2]

Paragraph 303 of the Stipulation asserts:

"In the management and maintenance of the managed properties, Arnheim and Neely, Inc., at all times acting pursuant to their contracts with the building owners, engages in the following:

a) Arnheim and Neely, Inc. hires all labor and employees required for the operation and maintenance of the managed premises. The hiring and pay of the building superintendents are occasionally subject to approval of the building owners.

b) Arnheim and Neely, Inc. discharges all labor and employees required for the operation and maintenance of the managed premises.

c) Arnheim and Neely, Inc. supervises all labor and employees required for the operation and maintenance of the managed premises.

d) Arnheim and Neely, Inc. provides a managerial person (separate and apart from the building superintendent) in regard to most, if not all of the managed properties.

e) Arnheim and Neely, Inc. schedules the hours to be worked by all persons engaged at the managed properties.

f) Arnheim and Neely, Inc. determines the rates of pay of all employees engaged at the managed properties, subject to approval of building owners without exception. . . .

g) Arnheim and Neely, Inc. determines the method of payment of all persons engaged at the managed properties, subject to union agreement, if any.

h) Arnheim and Neely, Inc. establishes fringe benefits for all persons engaged at the managed properties, subject to owner's approval.

i) Arnheim and Neely, Inc. negotiates union contracts in regard to those persons engaged at the managed properties who are union members. . . .

j) Arnheim and Neely, Inc. prepares the payroll for all persons engaged at the managed properties.

k) All persons engaged at the managed properties are paid by means of Arnheim and Neely, Inc. checks, drawn on the appropriate owner's account.

l) Persons on Arnheim and Neely, Inc's [sic] staff are assigned managerial responsibility for one or more of the particular buildings.

m) Arnheim and Neely, Inc., through its staff manager or through the building superintendent, assigns the persons engaged at the buildings to the various required duties and supervises the performance thereof.

n) Promotions or reductions in rank and increases or decreases in pay as to the persons engaged at the managed buildings are determined by Arnheim and Neely, Inc., subject to owner's approval.

o) Arnheim and Neely, Inc. makes legal deductions, including Income Tax, Social Security, etc., from the pay checks of all persons engaged at the managed buildings.

p) The 'Contract for Management' (Exhibit 1 [to the Stipulation]) provides, with respect to the managed buildings, 'that all employees shall be deemed the employees of the OWNER and not the AGENT.' "

Elsewhere in the Stipulation, it is asserted that "[e]ach building owner has separate employer's identification numbers for federal, state, and city payroll taxes." [Stip. ¶ 301(g)]

Section 6 of the Fair Labor Standards Act defines the following terms:

* * * *

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 29 U.S.C. § 203(d).

"(e) 'Employee' includes any individual employed by an employer . . . ." 29 U.S.C. § 203(d).

In *Greenberg* v. *Arsenal Bldg. Corp.*, 50 F. Supp. 760 (S.D. N.Y. 1943), aff'd per curiam 144 F. 2d 292 (2 Cir. 1944), rev'd in part on other grounds sub nom *Brooklyn Bank* v. *O'Neil*, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945), where suit was brought against a building rental agent, both the District and the Circuit Court held the defendant to be an "employer" within the meaning of the Act.*

Viewed broadly, the relationship described in the Stipulation between defendant and the employees comports with the statutory standard of employer-employee. See *United States* v. *Silk*, 331 U.S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757 (1947). It remains only to review certain aspects peculiar to this relationship to determine whether or not they require a contrary determination.

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* *Greenberg* asserted liability on the ground that the rental agent was an "employer" "acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 50 F. Supp. 760; cf. *United States* v. *Klinghoffer Bros. Realty Corp.*, 285 F. 2d 487 (2 Cir. 1960). As developed more fully, *infra*, our analysis does not view defendant as simply "acting in the interest of an employer."

In *Bartels* v. *Birmingham*, 332 U.S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947, 172 A.L.R. 317 (1947), band leaders resisted liability to their musicians on the grounds, inter alia, that leaders' contracts with ballroom operators specified that the musicians were to be regarded as employees of the operators rather than of the leader. The agreements also required filing of various social security taxes by the operators. Notwithstanding these features, the Supreme Court, reversing the Circuit Court's judgment, held the leaders liable.

The sole remaining element to be considered is the reservation by the owners of a right to review certain of defendant's determinations regarding the management of its building. It may well be that these provisions vest the owners with certain control over the employees. However, the Act recognizes the concept of joint employment. *Mitchell* v. *John R. Cowley & Bro., Inc.*, 292 F. 2d 105 (5 Cir. 1961); *Wirtz* v. *Hebert*, 363 F. 2d 139 (5 Cir. 1966); *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (10 Cir. 1942). Although the proprietors of the individual buildings may perhaps be deemed employers, *Wirtz* v. *Columbian Mutual Life Ins. Co.*, 246 F. Supp. 198, 201 (W.D. Tenn. 1965), this circumstance does not foreclose treating defendant as an employer within the meaning of the Act.

Defendant contends that Congress' adoption of the "enterprise" formula in 1961 requires a new test for determining the employer-employee relationship. We cannot agree. The Fair Labor Standards Amendments of 1961, Pub. L. 87-30, 75 Stat. 65 (U.S. Code Cong. & Adm. News 1961, p. 71 et seq.), [merely re-

pealed]" the prior provision limiting coverage to employees "engaged in commerce or in the production of goods for commerce" and provided coverage to all employees in an "'enterprise' engaged in commerce or production for commerce." *Maryland v. Wirtz*, 392 U.S. 183, 185, 186, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968). The 1961 amendments were unaccompanied by any modification in the definition of "employee", "employer" or "employment."[4] The decisional law reflects no change in the pre-1961 principle utilized for determining the employer-employee relationship.

Defendant relies on the statement in *Bartels v. Birmingham, supra*: ". . . In the application of social legislation employees are those who as a matter of economic reality are dependent upon the business as to which they render service." 332 U.S. 130. It contends that the business to which they render service is the building rather than defendant.

The statement in Bartels must be interpreted in the light of the judicial history construing the term "employee." As described in *Illinois Tri-Seal Products, Inc. v. United States*, 353 F. 2d 216 (Ct. Cl. 1965), in the years following the enactment of the Act in 1935, the Treasury Department and a majority of the courts held that the term was to be given its common-law meaning, which was grounded in the element of control. In 1947, the Supreme Court de-

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[4] The bracketed words were subsequently struck by the Act and the words "changed the basis of" were substituted.

The Fair Labor Standards Amendments of 1966, Pub. L. 89-601, 80 Stat. 830 (U.S. Code Cong. & Adm. News 1966, p. [illegible] et seq.) likewise made no modifications in the statutory definitions.

cided *United States v. Silk*, *supra*, holding that a "constricted interpretation" of the term "employee" to exclude all who are independent contractors within common-law concepts failed "to accomplish the purposes of the legislation." 331 U.S. 712.

Defendant seeks to utilize the "economic reality" doctrine to mitigate the indicia of its control of the employees. No warrant for this lies in the decisional law.

Defendant cites a section of the Senate Report No. 1487, 89th Cong., 2d Sess. (1966), on the 1966 Amendments to evidence a legislative intent to treat the employees in question as employees of the building owners:

> ". . . where a person other than the owner of an apartment building is engaged by the owner to perform management services in connection with the operation of the building, these individuals employed at and resident in the building as managers, caretakers, janitors, or in a similar capacity shall be considered for the purposes of this subsection employees of the building owner." 1966 U.S. Code Cong. & Adm. News, p. 3029.

Senate Report No. 1487 proposed the inclusion of equivalent language in an amended section 8(s). However, the Senate-House Conference Committee rejected the Senate's proposed amendment. 1966 Cong. Rec. 22651 (daily ed. Sept. 14, 1966). The Congressional treatment of the issue fortifies our conclusion that the relationship between building employees and management agents should be determined in accordance with the customary principles obtaining under the Act.

We conclude that the stipulated issue must be answered in the affirmative.

ISSUE

"In determining 'annual gross volume of sales made or business done' by the defendant within the meaning of Section 3(s) of the Act, are the gross rentals from the aforementioned management activities to be included or merely the commissions obtained by the defendant from such activities?" [Stip. ¶ 6]

According to the Stipulation, the annual gross rental income collected by defendant from the managed buildings exceeded $1,000,000 per annum. [Stip. ¶ 206] Defendant's commissions on these rentals approximated or exceeded $200,000 in 1964 and 1965, and $250,000 in 1966 and thereafter. [Stip. ¶ 207] Commissions have never exceeded $500,000 per annum. [Ibid]

The Fair Labor Standards Amendments of 1961, *supra*, established as one condition to "enterprise" coverage an "annual gross volume of sales of such enterprise . . . not less than $1,000,000." 29 U.S.C. § 203(s)(3) (1958 Ed. Supp. V). The Fair Labor Standards Amendments of 1966, *supra*, require for the period February 1, 1967, through January 31, 1969, a minimum "annual gross volume of sales" of $500,000 and thereafter of $250,000. 29 U.S.C. § 203 (s)(1) (1964 Ed. Supp. II).

Defendant contends that only its commissions of rentals should be included in determining its "annual gross volume of sales." In this instance, the statutory requirement for coverage would not have been satisfied until February 1, 1969. The Government

argued that the computation of defendant's "annual gross volume of sales" requires inclusion of all rentals collected by defendant.

The Senate Report on the 1961 Amendments expressed the underlying philosophy of the provision and asserted:

> "The million dollar test is *an economic test*. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating *a business of that size* in commerce can afford to pay his employees the minimum wage under this law." S. Rep., No. 145, 87th Cong., 1st Sess., U.S. Code Cong. & Adm. News 1961, p. 1624. Quoted in *Wirtz* v. *Savannah Bank & Trust Co. of Savannah*, 362 F. 2d 857, 862 (5 Cir. 1966); *Wirtz* v. *Columbian Mutual Life Ins. Co.*, *supra*, 246 F. Supp. 202; *Wirtz* v. *First National Bank and Trust Co.*, 365 F. 2d 641, 645n (10 Cir. 1966).

Defendant relies on two District Court opinions, *Schmidt* v. *Randall*, 160 F. Supp. 228 (D. Minn. 1958), and *Mitchell* v. *Carrell*, 160 F. Supp. 261 (S.D. Fla. 1956), wherein the plaintiffs' attempt to include the gross receipts of the defendants' sale of bus tickets were rejected in favor of computing only the defendants' commissions on the sales.

On the other hand, in *Wirtz* v. *Jernigan*, 405 F. 2d 106 (5 Cir. 1968), at issue was the computation of the defendant's sale of bus tickets as an agent of Greyhound Corporation. Including the gross receipts rather than the defendant's commissions, the Court speaking through Judge McEntee of the First Circuit, asserted:

". . . The district court reason
is not merely including his prof
pay certain expenses out of t
This is strictly true but nothing
It is equally true that the rest
over and above the price of the f
their reduced by overhead such s
ries. But if the fact that the co
represent pure profit leads to the
only the commissions should be c
termining qualification for the
the cost of food in the restaura
excluded on the same basis. Yet
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F. 2d 159.

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In *Wirtz* v. *First National Bank* supra, the landlord's wholly-owned
ceived a "management fee" of $30,00
gross earnings from rentals of over $
Court of Appeals for the Tenth Circu
gross rentals in determining the sub
volume of sales." 365 F. 2d 644, 645
Columbian Mutual Insurance Co., sup

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Cf. *Wirtz* v.
a.

We believe the *Jernigan* case *supra*
better view and the correct applicati
legislative intent. Accordingly, we con
rentals from defendant's management
be included in determining its "annu
of sales made or business done."

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Issue

"Are the business activities
. . . particularly those related t

[defendant]
the manage-

ment of various buildings, related activities performed through unified operation or common control for a common business purpose so as to constitute an enterprise within the meaning of Section 3(r) of the . . . Act . . .?" [Stip. ¶ 1]

Section 3(r), as added to the Act by the 1961 Amendments, *supra*, defined as follows:

> "'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. . . ." 29 U.S.C. § 203(r) (1958 Ed. Supp. V).

The statutory defintion of enterprise requires the existence of three elements: (1) related activities, (2) unified operation or common control, and (3) a common business purpose. *Wirtz* v. *Savannah Bank & Trust Co. of Savannah*, *supra*, 362 F. 2d 859.

As stated in the Regulations:

> ". . . the answer to the question whether particular activities are 'related' or not, will depend in each case upon whether the activities serve the business purpose of the enterprise, or whether they serve a separate and unrelated business." 29 C.F.R. § 779.206(b).

Defendant's relevant business includes the management of buildings. [Stip. ¶ 204] Its "Contract for Management" mandates it "[t]o hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises. . . ." [Stip. Exh. 1, p. 2] The activities of such laborers are related to defendant's business.

Paragraph 303 of the Stipulation, quoted *supra* at page 3 et seq, establishes defendant's "common control." Cf. 29 C.F.R. § 779.221. Likewise, the activities of the employees in each building serve a "common business purpose." Cf. 29 C.F.R. § 779.213.

Defendant challenges treating the various buildings as "establishments" of defendant. It argues:

> "[Plaintiff] has ignored the absolute necessity of establishing each of these various buildings as 'establishments' of the 'enterprise' of [defendant]. Nothing in the Stipulation or in the facts suggest [sic] that [defendant] maintains a distinct place of business anywhere else except at the Grant Building." [Defendant's Brief, p. 10]

The Act does not define the term "establishment." However, the term has been judicially construed to mean "a distinct physical place of business." *Phillips Co. v. Walling*, 324 U.S. 490, 496, 65 S. Ct. 807, 89 L. Ed. 1095, 157 A.L.R. 876 (1945). Accord: 29 C.F.R. § 779.23. This construction was not modified by more recent amendments to the Act. *Wirtz v. Savannah Bank and Trust Co. of Savannah*, *supra*, 362 F. 2d 363.

By its contract with the various buildings, defendant is in the "business" of managing the buildings' janitorial services. Necessarily these must be per-

formed in the building. Therefore, each building becomes one of defendant's "places of business."

Defendant argues:

> "... if the buildings themselves are to be considered part of [defendant's] 'enterprise', then how can the government avoid including the building owners as part of that enterprise? But to try to do so would have been ludicrous, for it is apparent ... that these various owners of the buildings are not acting together with each other and [defendant] for a 'common business purpose'. It is even possible that one owner does not know which other buildings [defendant] are [sic] managing for others." [Defendant's Brief, p. 10]

The flaw in this analysis is the correlation of "enterprise" to "buildings"; whereas the statutory definition defines "enterprise" as "related activities." 29 U.S.C. § 203r) (1958 Ed. Supp. V). Moreover, as the Regulations assert: "... the term 'enterprise' is roughly descriptive of a business rather than of an establishment or of an employer although on occasion the three may coincide." 29 C.F.R. § 779.203(b).

We are confronted here with a situation analogous to the case of a chain's store in a supermarket. Treating the entire supermarket as the owner's "establishment" does not preclude treating the particular store as one of the chain's "establishments" and the activities conducted in that "establishment" as part of the chain's "enterprise." Cf. 29 C.F.R. § 779.225.

ISSUE

"Among the persons ... employed at the various buildings managed by the defendant, are

there at least two persons performing activities which constitute engagement in interstate commerce or in the production of goods for commerce, within the meaning of the Act?" [Stip. ¶ 4]

The Stipulation refers to the activities of various employees in each building. [Stip. ¶ 501] These activities may be categorized as follows: 1) operating elevators carrying mailmen delivering mail and parcel post and carrying delivery men making deliveries, a "portion" of which originate outside Pennsylvania; 2) operating elevators carrying freight to and from the building, a "portion" of which involved interstate shipments; and 3) using in connection with maintenance work "goods . . . including such goods as soap, detergent, waxes, and light bulbs," originating outside Pennsylvania. [Stip. ¶¶ 501, 502]

In determining the coverage of elevator operators in office buildings, absent evidence that tenants are themselves engaged in producing goods for interstate commerce, the mere fact that elevator operators convey mailmen and deliverymen carrying items in interstate commerce does not suffice to bring the elevator operators within the coverage of the Act. *10 East 40th Street Building, Inc. v. Callus*, 325 U.S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806, 161 A.L.R. 1263 (1945).[1]

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[1] Plaintiff relies on *Wirtz v. Columbian Mutual Life Ins. Co.*, *supra*, as authority for treating the employees in the case at bar as engaged in interstate commerce. In the *Columbian* case, the Secretary sought coverage for elevator operators and building porters. The Court sustained coverage of

With reference to the janitors' use of "soap, detergent, waxes, and light bulbs" which have moved in interstate commerce, two features are important:

1) The term "goods," as defined in Section 3(i) of the Act, ". . . does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof." 29 U.S.C. § 203(i).

2) As stated in 29 C.F.R. § 779.240(a):

"... the mere fact that employees ... are using machinery, equipment, work tools, and the like, which may have been moved in or produced for commerce, does not mean that they are handling, selling, or otherwise working on 'goods' that have been moved in or produced for commerce within the meaning of Section 3(s)."

We conclude that there have not been two employees in each building engaging in interstate commerce.

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these employees under the "enterprise" doctrine on the basis of the porters' activities, described as follows:

"... The building does not have a freight elevator so that freight and express shipments are lowered into the basement during the day by a sidewalk lift operated by porters, signed for by them, and then at night these shipments are carried by porters, on the passenger elevators, to the offices of the tenants. A substantial part of these shipments have moved in interstate commerce." 246 F. Supp. 208.

In the case at bar, only employees at the Bold Building "personally" handle the delivery of parcels. [Stip. ¶ 501] Elsewhere, they merely operate elevators carrying deliverymen. [Id] Moreover, the Stipulation does not establish that a "substantial part" of these parcels had originated outside Pennsylvania. The Columbian case is inapposite.

Issue

"Prior to February 1, 1967, was defendant's business an enterprise as defined in Sections 3(r) and 3(s)(3) of the Act as it then read?" [Stip. ¶ 7]

We have heretofore concluded that the activities of the employees in question constituted part of the "enterprise" of defendant within the meaning of Section 3(r). Section 3(s), as supplied by the 1961 Amendments, *supra*, provided:

"'Enterprise engaged in commerce or in the production of goods for commerce' means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

* * * *

"(3) any establishment of any such enterprise . . . which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000." 29 U.S.C. § 203(s) (1958 Ed. Supp. V).

We have heretofore concluded that the "annual gross volume of sales" of defendant's enterprise requires a computation of the gross rental receipts for the various buildings. However, we have also heretofore concluded that at none of the buildings did defendant have two or more employees engaged in commerce or in the production of goods for com-

merce." None of the employees were covered under the 1961 Amendments to the Act.

Issue

"Does [defendant] employ anywhere two or more persons performing activities which constitute engagement in interstate commerce or in the production of goods for commerce, within the meaning of the Act, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce?" [Stip. ¶ 5]

The Stipulation asserts:

". . . a number of [defendant's] employees employed in its home office were regularly and recurringly engaged in preparing and handling correspondence, remittances, billings, advertising materials, and other miscellaneous goods, including profit and loss statements, governmental reports, and real estate leases, a portion of which were transmitted to points outside the Commonwealth of Pennsylvania, and regularly and recurringly using channels and facilities of interstate communication such as telephones, telegraph, and United States mail in corresponding and communicating with persons and concerns located outside the Commonwealth of Pennsylvania." [Stip. ¶ 21]

Section 3(b) of the Act defines "commerce" to include ". . . communication among the several States or between any State and any other place outside thereof." 29 U.S.C. § 203(b). Employees engaged in these activities are engaged in interstate commerce. *Mitchell v. Joyce Agency, Inc.*, 348 U.S. 945, 75 S.

...86, 99 L. Ed. 740 (1955), rev'g 211 F. 2d 241 (7 Cir. 1954), rev'g in part 110 F. Supp. 918 (N.D. Ill. 1953); *Mitchell v. Kroger Co.*, 248 F. 2d 935 (8 Cir. 1957).

We conclude that defendant employs two or more persons performing activities which constitute engagement in interstate commerce.

ISSUE

"After February 1, 1967, was defendant's business an enterprise as defined in Section 3(r) and 3(s)(1) of the Act as amended?" [Stip. ¶ 8]

We have heretofore determined that defendant's operations constituted an ["establishment"] within the meaning of Section 3(r) of the Act, as amended in 1961. The 1966 Amendments, *supra*, note 6, made no relevant alteration in the language of Section 3(r). Therefore, defendant's relevant activities have also constituted an "enterprise" since February 1, 1967.

The 1966 Amendments, *supra*, adopted a new Section 3(s), which provides:

"'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

"(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales

made or business done is not less than $500,000 . . . and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 . . . ." 29 U.S.C. § 203(s) (1964 Ed. Supp. II).

It is not disputed that defendant's enterprise "has employees engaged in commerce." Based on a prior conclusion, it is likewise clear that defendant's "annual gross volume of sales made or business done" exceeds the statutory minimums.

We conclude that after February 1, 1967, defendant's business constituted an "enterprise" within the meaning of the Act.

Issue

"If there is liability under the Act to any of the employees of any of the buildings managed but not owned by [defendant], is it the liability of the defendant or is it the liability of the owner of the buildings?" [Stip. ¶ 3]

Section 6 of the Act imposes liability for payment of the minimum wage and overtime pay on the "employer." 29 U.S.C. §§ 206, 207. We have heretofore noted that defendant is the "employer" within the meaning of the Act; and thus its liability is clear. None of the building owners are parties to this action. Accordingly, any observation we might make regarding their own potential liability would not be dispositive of an issue not properly within the ambit of the

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* The bracketed words was subsequently struck by the court and the word "enterprise" was substituted.

instant action. Cf. *Annetts v. 149 Madison Ave. Corp.*, 65 F. Supp. 385 (S.D. N.Y. 1945), aff'd 156 F. 2d 239 (2 Cir. 1946), aff'd 331 U.S. 199, 67 S. Ct. 1178, 91 L. Ed. 1432, 169 A.L.R. 1293 (1947), modified on other grounds 331 U.S. 795, 67 S. Ct. 1726, 91 L. Ed. 1822 (1947).

Opinion

ORDER OF COURT

AND NOW, to-wit, this 30 day of September, 1969, it is hereby ORDERED and DIRECTED that counsel for the plaintiff submit, after notice to counsel for the defendant and for the intervener, within twenty (20) days, a proposed form of order for final judgment in accordance with the foregoing Opinion.

JOHN L. MILLER
United States District Judge

[Caption Omitted]

ORDER AMENDING OPINION

And Now, to-wit, this 6 day of October, 1969, the Opinion filed herein on September 29, 1969, is hereby amended by striking the words "merely repealed" as they appear in the third sentence of the third paragraph on page six, and substituting therefor the words "changed the basis of".

The Opinion is also amended by substituting the word "enterprise" for the word "establishment" in the first sentence of the first paragraph on page eighteen of the said Opinion.

JOHN L. MILLER
United States District Judge.

Order

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[Caption Omitted]

ORDER

This cause was heard on motion of the plaintiff for summary judgment and on cross motions of the defendant Arnheim and Neely, Inc., and defendant intervenor The Institute of Real Estate Management of the National Association of Real Estate Boards for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court, having considered the pleadings herein and the comprehensive stipulations of facts of the parties, and having heard the argument of counsel, and after due deliberation a written opinion having been duly entered, it is

ORDERED that defendant and defendant intervenor's cross motion for summary judgment be and hereby is gratned with respect to wage payments made prior to February 1, 1967 in conformity with the opinion of this Court entered herein, and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be and hereby is granted with respect to wage payments made after February 1, 1967 in conformity with the opinion of the Court entered herein, that the defendant constitutes an enterprise engaged in commerce and/or in the production of goods for commerce within the meaning of Section 3(s)(1) under the 1966 amendments to the Fair Labor Standards Act (80 Stat. 830), and not within the meaning of Section 3(s)(3) under the 1961 amendments to the Fair Labor Standards Act (75 Stat. 65), and it is

FURTHER ORDERED that, in the exercise of the Court's discretion, no injunction will be entered regarding future violations of the Act.

December 17, 1969.

JOHN L. MILLER
United States District Judge

[Caption Omitted]

NOTICE OF APPEAL

Notice is hereby given that Arnheim and Neely, Inc., Defendant above named, and The Institute of Real Estate Management of The National Association of Real Estate Boards, Intervenor above named, hereby appeal to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on the 17th day of December, 1969.

[Filed Feb. 11, 1970]

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Estate Management

[Caption Omitted]

NOTICE OF APPEAL

TO THE COURT OF APPEALS FROM A JUDGMENT OR ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA:

Notice is hereby given that George P. Shultz, Secretary of Labor, United States Department of Labor, plaintiff above named, appeals to the United States Court of Appeals for the Third Circuit from so much of the judgment entered in this action on December 17, 1969, as disallows the plaintiff's claim that the defendant was an enterprise within the meaning of Section 3(s)(3) as per the 1961 Amendments to the Fair Labor Standards Act of 1938, (52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*), (75 Stat. 65), and the denial of ensuant back wages and the refusal of the trial court to order an injunction as against further violations of the Act.

★ U. S. GOVERNMENT PRINTING OFFICE: 1970

SUPREME COURT OF THE UNITED STATES

No. 71-1598,

James D. Hodgson, Secretary of Labor,
Petitioner,

v.

Arnheim and Neely, Inc., et al.

ORDER ALLOWING CERTIORARI. Filed October 10, 1972.

The petition herein for a writ of certiorari to the United State Court of Appeals for the Third Circuit is granted.

☆ U.S. Government Printing Office: 1972—488-231/39

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CITATIONS

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Statutes:

Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*:

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–

JAMES D. HODGSON, SECRETARY OF LABOR, PETITIONER

v.

ARNHEIM AND NEELY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App A, *infra*) is reported at 444 F. 2d 609. The opinion of the district court (App. D, *infra*) is reported at 324 F. Supp. 897.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1971 (App. C, *infra*). A timely petition for rehearing *en banc* was denied on February 9, 1972 (App. B, *infra*). On May 10, 1972, Mr. Justice Brennan extended the time for filing a petition for a writ

of certiorari to June 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in determining whether the gross dollar volume of business done by a real estate management firm managing several office and apartment buildings for different owners is sufficient to bring janitorial and maintenance employees at those buildings within the protection of the Fair Labor Standards Act, all the buildings managed by the firm should be considered part of a single "enterprise," within the meaning of Section 3(r) of the Act, 29 U.S.C. 203(r).

STATUTES INVOLVED

Section 3(r) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 203(r)), reads as follows:

> "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor * * *.

Section 3(s)(1) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 203(s)(1)), reads as follows:

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated) * * *.

STATEMENT

This suit was brought by the Secretary of Labor to enjoin Arnheim and Neely, Inc. (hereinafter "respondent") from violating the minimum wage, overtime and recordkeeping provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.*, and from continuing to withhold wages due to its building maintenance employees. Respondent admitted that it did not pay the wages or keep the records required by the Act, but claimed that it was not an "employer" of the maintenance workers

and, further, that it was not subject to the Act's requirements since it did not meet the "enterprise" coverage test of Section 3(s)(1) (*supra*, p. 3).

Respondent is a real estate firm that manages eight office buildings and one apartment complex in the greater Pittsburgh area, each of which has a different owner. These management activities are carried out under contracts with the building owners delegating to respondent all the functions required for leasing, operating, and maintaining the buildings, including the following: obtaining tenants; negotiating, executing, and enforcing leases; collecting rents; arranging for the provision of utilities and other services; purchasing supplies; cleaning, repairing, decorating, and altering the premises; and paying all expenses of operation (A. 17-20, 24, 39-41).[1]

Respondent conducts these building management activities from a central office, under the direction of several "staff managers" who are each assigned "managerial responsibility for one or more of the [nine] buildings" (A. 20-21, 26-27), and who are assisted by clerical and staff personnel. In addition to these employees, respondent hires, discharges and supervises all the labor required to operate and maintain the managed buildings, including superintendents, assistant superintendents, cleaning ladies, custodial workers, watchmen, elevator operators, and engineers (A. 25, 29-36, 45-48; Stip. Exh. 8). Respondent assigns the duties, fixes the hours of work and determines the rates of pay of the maintenance employees, although

[1] "A." refers to the Appendix filed in the court of appeals.

these matters may be subject to the particular owner's approval (A. 25–26). Respondent handles negotiations with any union representing or seeking to represent the maintenance workers (A. 26).

The rents collected from the managed buildings, which total more than $1.9 million per year, are deposited into separate bank accounts maintained for each owner. Each account is used by respondent to pay all expenses incurred in operating the building, including the wages of the maintenance workers. After respondent has paid expenses and deducted its commissions, it remits the balance to the building owner (A. 19–22, 39).

The district court held that the janitorial and maintenance personnel employed at the buildings managed by respondent were entitled to the protection of the Act after February 1, 1967, the effective date of certain amendments to Section 3(s) adopted by Congress in 1966.[1] In so finding, the court held that respondent was an "employer" within the meaning of the Act (App. D, *infra*, pp. 31–37) and that its building maintenance activities were "related" and performed under "common control" for "a common business purpose," so as to constitute a single "enterprise" within the meaning of Section 3(r) (App. D, *infra*, pp. 39–42).

[1] Prior to the 1966 amendments, the statute contained a considerably narrower definition of engagement in commerce. The district court concluded that the employees involved here were not engaged in commerce, and therefore not subject to the Act, prior to the effective date of those amendments. The court of appeals did not reach this issue, and we do not seek review of it here.

It also held that the size of this enterprise (*i.e.*, its annual gross volume of sales made or business done) should be measured by the gross rents received from the buildings it managed and not, as respondent had contended, by respondent's commissions (App. D, *infra*, pp. 37–39).

The court of appeals sustained the district court's rulings holding respondent to be an "employer" (App. A, *infra* pp. 16–18) and concluding that the gross volume of sales made or business done should be measured by rents rather than commissions (App. A, *infra*, pp. 18–19), but reversed the decision on the ground that each building constitutes a separate and distinct "enterprise" under Section 3(r) (App. A, *infra*, pp. 19–24).

In reaching this result, the court of appeals concluded that Section 3(s) embodies a legislative policy to avoid undesirable economic consequences to small or inefficient businesses by exempting them from minimum wage requirements. Because respondent maintains a separate bank account for each owner and because application of the Act to the maintenance workers would impose an economic burden on the owners, the court held the "enterprise" definition inapplicable to respondent's operations with respect to the maintenance workers, and looked instead to the building owners. Since the evidence showed no "common business purpose" on the part of the owners, the court found no requirement "that the gross rentals of each of the Company's [respondent's] principals be pooled together merely because each principal has employed

the Company as an agent" (App. A, *infra*, p. 21). Since each building was, therefore, to be considered a separate "enterprise," the court remanded the case to the district court for findings on whether any of the buildings generated enough rent individually to come within the coverage of the Act.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with the decision of the Fourth Circuit in *Shultz* v. *Falk*, 439 F. 2d 340, certiorari denied *sub nom. Falk v. Hodgson*, 404 U.S. 837, as was recognized by the court below in its opinion (App. A, *infra*, p. 21).[1] This conflict involves an issue that affects hundreds of businesses and thousands of employees around the country and that will undoubtedly generate litigation in every court of appeals in the Nation unless resolved by this Court. Review by this Court is thus essential to the orderly administration and uniform enforcement of the Act in an area where Congress sought to eliminate fragmentation of coverage and thereby extend the Act's protection to numerous workers who, for the most part, are in need of that protection.

1. This case and *Shultz* v. *Falk*, *supra*, are identical except for the immaterial fact that respondent's management activities are performed in connection with office buildings and an apartment complex, while

[1] The government did not oppose the granting of certiorari in *Falk* on the question presented in the present petition if the conflict between the Third and Fourth Circuits was not eliminated by the government's then-pending petition for rehearing in the present case (see *Falk* v. *Hodgson*, No. 70-225, Memorandum for the Respondent, p. 16).

those in *Falk* were performed in connection with apartment buildings only. Moreover, the precise contention accepted by the court below as the basis for its decision—viz., that respondent's building management activities could not be treated as part of a single enterprise unless the interests of the building owners were also related—was rejected by the Fourth Circuit in *Falk*, in these terms (439 F. 2d at 346):

> It is *defendants'* activities at each building which must be held together by a common business purpose, not all the activities of all owners of apartment projects. All that the enterprise requirement entails is that the defendants maintain under "common control" or as a "unified operation" a set of "related activities" having a "common business purpose," and that their employees be employed as a part of this operation. The organization and operation of defendants' apartment management business satisfy these requirements. Defendants supervise the employees involved here through a hierarchy terminating in their central offices. The services provided are substantially similar from project to project, and have the common purpose of maintaining and operating apartment buildings. The building workers are employed in this enterprise, since they are under defendants' control and carry out its purposes. The fact that they are employed at separate buildings does not prevent their being part of the same enterprise for purposes of the Act [emphasis in original]. * * *

2. While we are unable to supply a precise estimate of the number of businesses and employees who are

affected by this issue, it is clear that, considering real estate management companies alone, the number is substantial. For example, the motion of The Institute of Real Estate Management to intervene as a party defendant in this case, which was filed in the district court, represents that the Institute has 1650 members who manage a total of 7500 buildings (Motion to Intervene as a Defendant under Rule 24, p. 2). It may safely be assumed that the correct defintion of "enterprise" is relevant to the application of the Act to many, if not most, of the Institute's members, and further that they employ tens of thousands of relatively unskilled and low-paid maintenance and janitorial workers.

Moreover, petitioner has brought enforcement actions against real estate management firms in fifteen other cases now pending in district courts in six circuits. The resolution of each of these cases depends in important part on the correct application of the "enterprise" definition. In addition, the Wage and Hour Division of the Department of Labor has 350 pending investigations of real estate management firms and completed 250 such investigations in the month of April 1972. The "enterprise" issue is relevant to a substantial proportion of these investigations.

The need for resolution of this issue will be further increased in the event of enactment by Congress of amendments to the Act recently passed by the House of Representatives, or of similar legislation. H.R. 13, passed by the House on May 11, 1972, provides a different minimum wage for enterprises with an an-

nual gross volume of business above $1,000,000 from that which would be applicable to enterprises with a gross of between $250,000 and $1,000,000. The determination of the minimum wage applicable to building maintenance workers will thus depend on the size of the "enterprise" by which they are employed.

3. The court below misconstrued Section 3(r). That Section defines "enterprise" as "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose." There is no requirement that these activities be conducted in establishments owned by the person or persons performing the activities or that the establishments where the activities are performed be related. It is necessary only that the *activities* be "related" and that *they* be performed "either through unified operation or common control for a common business purpose." As shown by the quoted excerpt from the Fourth Circuit's opinion in *Falk* (p. 8 *supra*), these statutory requirements are clearly met by respondent's operations.

The contrary view of the court below is apparently based on its belief that since respondent maintains "*separate bank accounts for each owner*," it would be unfair, in determining the scope of respondent's enterprise, to pool the rents from the several buildings "merely because each principal has employed the Company as an agent" (App. A, *infra*, pp. 20–21; emphasis in original). But the Act's enterprise provisions are concerned not with a company's "profit" (or loss) or "net income" (or its "presumed economic capacity to

pay" (App. A, *infra*, p. 20)), but, rather, with the size of its activities and the impact of those activities on commerce. S. Rep. No. 1487, 89th Cong., 2d Sess., pp. 7–8; see also *Shultz* v. *Falk*, *supra*, 439 F. 2d at 347; *Wirtz* v. *Allen Green & Associates, Inc.*, 379 F. 2d 198, 199–200 (C.A. 6). The fact that respondent maintains separate bank accounts for each building owner does not reduce the magnitude of respondent's building management activities, nor does it diminish their impact on commerce.

This action was not brought against the building owners, and it is not here contended that they are in violation of the Act. Moreover, the court of appeals' solicitude for the plight of the building owners is misplaced, since it overlooks the fact that the owners are the beneficiaries of respondent's ability to make bulk purchases of supplies, to offer the services of experienced management personnel who also manage other buildings, to provide efficient centralized billing and collection services, and otherwise to operate the buildings more efficiently and at lower cost than would be possible if each building were managed separately.[4]

In short, the court of appeals has unwarrantably imposed a narrow construction of the Act's coverage, ex-

[4] The excerpt from the legislative history relied upon by the court of appeals (App. A, *infra*, p. 22) is addressed, not to the situation presented by respondent's operations, but to those coming within the ambit of the proviso to Section 3(r), such as individual tenants in a shopping center or independently owned franchisees. In none of those situations does the non-covered business (equivalent to the building owners) employ the umbrella organization (*e.g.*, shopping center or franchisor) as its agent for the purpose of operating its business and hiring, assigning, and paying employees.

cluding thousands of workers who are commonly required to put in long hours at low pay. This is contrary to this Court's established policy favoring liberal construction of the Act so as to apply it "to the furthest reaches consistent with congressional direction." *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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ANDREW L. FREY,
Assistant to the Solicitor General.

RICHARD F. SCHUBERT,
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JUNE 1972.

APPENDIX A

United States Court of Appeals for the Third Circuit

Nos. 18,772, 18,773, 18,774

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT IN No. 18,772

v.

ARNHEIM AND NEELY, INC., A CORPORATION, APPELLANT IN No. 18,773 AND THE INSTITUTE OF REAL ESTATE MANAGEMENT OF THE NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, INTERVENOR, APPELLANT IN No. 18,774

(D.C. Civil Action No. 67-1202)

Appeal From the United States District Court For the Western District of Pennsylvania

Argued March 17, 1971

Before ADAMS and GIBBONS, *Circuit Judges*, and WHIPPLE,* *District Judge*.

OPINION OF THE COURT

Filed June 15, 1971

ADAMS, *Circuit Judge*. In this case we are asked to decide whether a real estate management company

*Of the New Jersey District Court sitting by designation.

which operates and maintains, but does not own, certain commercial buildings is an employer whose activities are regulated by the Fair Labor Standards Act as amended.

The Secretary of Labor sought an injunction in the District Court for the Western District of Pennsylvania under § 17 of the Fair Labor Standards Act, 29 U.S.C.A. § 201, *et seq.*, to enjoin Arnheim and Neely, Inc. (Company) for violating the minimum wage, overtime, and record keeping provisions of the Act, and to require the Company to pay back wages owed to the employees.

The District Court decided that from January, 1964 until February, 1967 the Company had not been subject to the Act's requirements, but thereafter, as a result of the 1966 amendments to the Act, the Company came within the enlarged scope of the Act, because the 1966 amendments reduced the economic criteria for coverage. Accordingly, the District Court granted the relief sought by the Secretary of Labor for the years following 1967 only. The Government appealed, and the Company filed a cross appeal.

The facts have been stipulated. The Company manages eight office buildings and one apartment complex located in the greater Pittsburgh area. The Company does not own these buildings except for a minor interest in one of them, but operates them under a management contract. Pursuant to the contract, the Company obtains tenants, negotiates and signs leases, institutes legal actions regarding these leases when necessary, alters and redecorates the buildings according to its own judgment, obtains utility contracts, and pays taxes and other bills relating to the properties. The Company collects the rent receipts for each building and deposits them in a separate bank account established for each building. The funds de-

posited in these accounts are the property of each building's owner, and expenses for each building are paid from the bank account established for that building. Any loss suffered in regard to a particular building is the loss of the owner of such building and not of the Company. Likewise, the profits belong to the respective owners of the buildings and not to the Company. Periodically, the Company withdraws the balance of funds having accrued in each account and forwards them to the respective owners.

The Company hires, discharges and supervises all employees necessary for the operation and maintenance of the buildings. Such employees include building superintendents and their assistants, cleaning ladies, custodians, watchmen, and elevator operators. Subject to the approval of the building's owner, the Company assigns each worker to his particular duties, fixes hours of work, and negotiates rates of pay and fringe benefits. In each building at least two employees operate elevators which carry postmen and messengers who deliver mail and packages to the building's tenants; a portion of such mail and packages originate from points outside of Pennsylvania. In one of the buildings, the Buhl Building, two employees personally deliver to tenants parcels, some of which originate outside of Pennsylvania. At another building, 319 Fifth Avenue, the elevator operators transport freight from the tenants, a portion to be delivered to points outside of Pennsylvania.

"Staff managers" employed by the Company maintain records relating to these buildings and submit periodic reports to the owners of each building. Some of the owners are located in states other than Pennsylvania. In 1964, the aggregate gross receipts from the nine buildings was approximately two million dollars, and from 1956 until the present the gross re-

ceipts have exceeded one million dollars per year.[1] The Company's commission has varied from year to year, but at no time has exceeded five hundred thousand dollars in any one year.

The Fair Labor Standards Act requires employers covered by the Act to pay their employees a fixed minimum wage,[2] forbids employers to require their employees to work more than a forty hour week unless they receive one and one half times their regular wages for such work, and mandates that records of wages and hours be maintained by the employers.

In reaching its ultimate conclusions regarding the scope of the Act's coverage before and after the 1966 amendments, the District Court made several subsidiary legal determinations. Each has been attacked, either by the Secretary or the Company.

I

The District Court decided that the Company, notwithstanding the fact that it was acting as an *agent*

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[1] The gross receipts of each building during 1964 are stipulated:

Buhl Building	$93,537.69
Clark Building	800,902.10
Eureka Savings Building	71,873.94
Keenan Building	176,653.72
Marlin Building	117,948.45
Pittsburgh Terminal Properties	265,225.57
University Square No. 1	277,848.00
Pittsburgh Life Building	54,307.00
Building 319 Fifth Avenue	57,190.00
	1,935,485.72

[2] The basic minimum wage set by the Act has been increased by Congress several times during the periods relevant to this case:

From 1/4/64 until 1/31/67	$1.25
From 2/1/67 until 1/31/68	1.40
From 2/1/68 until the present	1.60

in hiring employees to maintain the buildings, was an "employer" as defined by the Act. In so deciding the District Court rejected the Company's contention that the term "employer" was to be given its common law or its traditional meaning. Instead, the Court applied the standard contained within the Act itself. The Act provides "that the term 'employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . ." 29 U.S.C.A. § 203(d). On its face the statute adopts a definition of the term "employer" broader than that of the common law, and applicable under the present facts to the Company. Thus, in Greenberg v. Arsenal Bldg. Corp., 50 F. Supp. 700 (S.D.N.Y. 1943), aff'd 144 F.2d 292 (2nd Cir. 1944), rev'd on other grounds sub nom. Brooklyn Bank v. O'Neil, 324 U.S. 697 (1945), it was held that a real estate management company is an employer for purposes of the Act despite the agency relationship of the management company to owners of the managed buildings.

The fact that the owners of the buildings may also be considered "employers" as a result of their ultimate right to review policies and hiring practices followed by the Company does not preclude a finding that the Company is also an "employer." The Act contemplates the possibility of several simultaneous "employers" any one of which may be liable as an employer under the Act. Wirtz v. Herbert, 368 F.2d 199 (5th Cir. 1966); Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655 (10th Cir. 1942).

The Company argues that Bartels v. Birmingham, 332 U.S. 126 (1947), provides the applicable test—one of economic reality—to determine whether it is an "employer." As support for this contention, the Company stresses certain language of the *Bartels* opinion: "Obviously control is characteristically as-

sociated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." 332 U.S. at 130. The District Court read this language in conjunction with United States v. Silk, 331 U.S. 704 (1947), decided a week before *Rutherford*, which held that in social legislation the term "employer" was not to be given a restrictive common law construction. 331 U.S. at 713. Thus the Courts are required to avoid technical concepts of the employment relationship and are admonished to examine the economic realities presented by the facts of each case. Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961). Applying the "economic reality" test to the present facts, there can be no doubt of the appropriateness of treating the Company as an employer. The Company's business is that of maintaining and managing real property for the individual owners of such property. Such activity provides economic benefit to the Company's clients as well as to the Company itself. Unsatisfactory work will harm both the Company and the building owners. Since the Company hires these employees and provides the conditions of their employment, it appears that the Company is "acting directly or indirectly in the interest of an employer in relation to an employee." The District Court correctly decided that the Company was an "employer" of the various persons working at the buildings, as such term is defined by the Act.

II

A second test imposed by the Act concerns the "amount of gross volume of sales of [the] enterprise," 29 U.S.C.A. § 203(s)(3) before the 1966 Amendments; 29 U.S.C.A. § 203(s)(1) after the 1966

Amendments. The District Court, over the objections of the Company, decided that the economic test contained in the Act applied to the gross rental receipts of the buildings and not to the gross commissions earned by the Company. We agree with the District Court. The statute clearly refers to the gross sales of an "enterprise,"[1] which term is defined as "related activities performed . . . by any person or persons for a comon business purpose. . . ." § 203(s). Thus, in Wirtz v. Jernigan, 406 F.2d 155 (5th Cir. 1968), it was squarely held that in deciding whether the seller of bus tickets came within the Act's coverage, the gross dollar volume of ticket sales, *not* the seller's commission, was the appropriate indicia of coverage. Since rentals are sales within the meaning of the Act, Wirtz v. First National Bank and Trust Company, 365 F.2d 841 (10th Cir. 1966), it logically follows that the gross rentals of buildings managed by the Company, and not merely the Company's commissions are to be considered in applying the Act.

III

Although the Company is an "employer" within the meaning of the Act, and the gross rentals rather than the gross commissions govern, we think the District Court erred when it aggregated the rental income of all nine buildings in applying one of the Act's criteria for coverage, the economic test. In addition to the "employer" requirement of the Act, before the 1966 amendments section 203(s)(3) set forth an economic test which limits the Act's coverage to certain businesses enjoying an annual gross

[1] Before the 1966 Amendments the Act referred to gross sales of any "establishment" of an "enterprise." Thus, prior to the effective dates of the 1966 amendments, it is clear that the gross rentals of each building would have to be considered separately in applying the Act's economic test.

volume of sales over one million dollars. The 1966 amendments expanded the Act's coverage by lowering the economic requirement to $500,000 during the period February 1, 1967 through January 31, 1969, and thereafter to $250,000. The legislative history of the Act makes it abundantly clear that the purpose of providing coverage to those companies with a minimum amount of gross sales was to avoid economic dislocation. The Senate Report accompanying the 1961 Amendments to the Act specifies:

> "The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under the law." (emphasies added) 1961 U.S. Code Cong. & Admin. News 1620, 1624.

Since the economic criteria of the Act is based upon a legislative judgment that only businesses which have attained a substantial gross volume of sales should be covered because of their presumed economic capacity to pay a prescribed minimum wage, apparently Congress feared that there might be undesirable economic consequences to small or inefficient businesses if they were brought within the scope of the Act.

The Company here did not benefit, except as to its commission, as a result of the aggregate gross volume of rentals accruing from all nine buildings. Instead it acted solely in an agency capacity on behalf of each of nine separate and distinct businesses. The facts stipulated in this regard are that the rentals collected by the Company are deposited in *separate bank ac-*

funds for each owner, and such funds are the property of the respective owners of the buildings. Any economic loss suffered in connection with a particular building is that of the owner. Similarly any profit enjoyed belongs to the individual building's owner. While as an agent the Company is liable as an "employer" to adhere to the strictures of the Act, nevertheless such vicarious responsibility does not require that the gross rentals of each of the Company's principals be pooled together merely because each principal has employed the Company as an agent.

The District Court reasoned that since the Company was in the 'business' of managing the buildings' janitorial services, . . . each building becomes one of [the Company's] 'places of business.'" The analysis employed by the court below has been directly adopted by the Fourth Circuit in Shultz v. Falk, No. 14,572 (filed March 3, 1971). However, the Act requires that before separate establishments be deemed part of an enterprise, they first must be found to be "related activities performed . . . for a common business purpose. . . ." The owner of each of these buildings is not engaged in a business purpose common to all the other eight building owners merely because each employed a common agent. The record is devoid of any other evidence tending to demonstrate that the nine individual building owners have a "common business purpose."[4] Were the buildings managed by their owners, the Government would not attempt to link them together as an enterprise bound together by a "common business purpose." The building owners' em-

[4] In Mitchell v. Hertzke, 284 F.2d 183 (10th Cir. 1956), the court held that the Secretary of Labor has the burden of proof on this type of issue in this case.

ployment of the Company as rental agent does not alter this critical fact.

The legislative intent to exclude for purposes of the Act separate businesses which use common service organizations was made manifest in the Senate Report to the Fair Labor Standards Amendments of 1961, which adopted the "enterprise" concept (1961 U.S. Code Cong. & Admin. News 1620, 1660-1661):

> "The bill also contains provisions which should insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings.
>
> "The definition of 'enterprise' expressly makes it clear that a local retail or service establishment which is under independent ownership shall not be considered to be so operated and controlled as to be other than a separate enterprise because of a franchise, or group purchasing or group advertising arrangement with other establishments or because the establishment leases premises from a person who also happens to lease premises to other retail or service establishments. For example, a retail establishment will not become part of an enterprise which operates a shopping center merely because it rents its establishment from the shopping center operator."

If the record in this case revealed that the retention of the Company were accompanied by a change in the independent business purposes of the owners—for example facts such as the pooling of profits from the various buildings demonstrating a common business purpose—the result might be different. Here, however, the record reveals that the owners

share no common purpose except the decision to hire the Company as their rental or management agent. As pointed out in Wirtz v. Hardin & Co., 258 F.S. 975 (N.D. Ala. 1964), aff'd 350 F.2d (5th Cir. 1965), the utilization of a common service does not by itself establish a common business purpose shared by the owners of separate businesses. Without more than here presented, we think the "enterprise" requirement of the Act has not been satisfied. It would be anomalous to treat the owners of commercial buildings as proprietors of individual businesses when they manage the buildings themselves and as participating in a "common business purpose" with other building owners merely because they hire a rental agent who manages other buildings.[1] This is particularly so in view of the expressed intent of Congress not to burden small businesses with a minimum wage they may not be able to afford. Therefore, we think the proper approach under the facts of this case is to consider each of the nine buildings separately.

We do not reach additional questions posed on this appeal regarding whether the Company is engaged in interstate commerce as required by the Act, because viewing the gross rentals of each building separately it appears that in 1964 none of the buildings produced sufficient gross rentals to satisfy the Act's economic test. Since the stipulations of fact do not indi-

[1] It might also be considered anomalous that service employees hired by the management company might be paid different wages depending on the gross rentals of the particular building to which they were assigned. However, in view of the "common business purpose" requirement of the Act, we think the scale tips toward preventing inconsistent treatment of building owners who employ management companies as opposed to owners who manage their own buildings.

cate the gross rentals of each building after 1964, we are unable to determine whether any one of the buildings alone satisfies the reduced criteria provided by the 1966 Amendments for coverage under the Act.

Accordingly, the order of the District Court will be reversed and the case remanded so that the Government may have the opportunity to introduce evidence regarding each buildings' gross rentals during the relevant years.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 18,772/3/4

JAMES D. HODGSON, SECRETARY OF LABOR, ETC.
APPELLANT IN *No. 18,772*

v.

ARNHEIM AND NEELY, INC., ETC.
APPELLANT IN *No. 18,773*

and

THE INSTITUTE OF REAL ESTATE MANAGEMENT, ETC.
APPELLANT IN *No. 18,774*

SUR PETITION FOR REHEARING

Present: Chief Judge SEITZ, Judge VAN DUSEN, Judge ALDISERT, Judge ADAMS, Judge GIBBONS, Judge ROSENN, *Circuit Judges*, and Judge WHIPPLE, *District Judge*.

The petition for rehearing filed by

JAMES D. HODGSON

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

ARLEN M. ADAMS, *Judge*.

Dated: February 9, 1972

APPENDIX C

In the United States Court of Appeals for the Third Circuit

Nos. 18,772 THROUGH 18,774

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT IN No. 18,772

v.

ARNHEIM AND NEELY, INC., A CORPORATION, APPELLANT IN No. 18,773

and

THE INSTITUTE OF REAL ESTATE MANAGEMENT OF THE NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, INTERVENOR, APPELLANT IN No. 18,774

(D.C. Civil Action No. 67-1202)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS and GIBBONS, *Circuit Judges* and WHIPPLE*, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On considertaion whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 17, 1969, be, and the same is hereby reversed, and the cause remanded

so that the Government may have the opportunity to introduce evidence regarding each buildings' gross rentals during the relevant years, in accordance with the opinion of this Court. Costs taxed in favor of appellants in all cases.

Attest:

THOMAS R. QUINN, *Clerk.*

JUNE 15, 1971.

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*Of the District Court for the District of New Jersey, sitting by designation.

Costs taxed in favor of appellants in Nos. 18773/4 as follows:

Clerk's fees	$50.00
Brief for Arnheim & Neely and Inst. of Real Estate Mgmt	334.16
Total	384.16

APPENDIX D

OPINION

[Caption Omitted]

MILLER, D.J.

By his Complaint, plaintiff, Secretary of Labor of the United States Department of Labor, seeks injunctive relief to enjoin alleged violations of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 251(a)(2), 215(a)(5).

Defendant, Arnheim and Neely, Inc., is a Pennsylvania corporation engaging in real estate management, brokerage sales, real estate appraisals, insurance sales, and miscellaneous other real estate management activities. It answered the Complaint denying salient allegations thereof.

On January 17, 1968, the Institute of Real Estate Management of the National Association of Real Estate Boards filed a motion to intervene as a defendant under Rule 24 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 24. On January 18, 1969, "[b]y agreement of the parties," the Court granted the Motion" . . . with the understanding that litigation will not be extended beyond the facts relating to the business operations of defendant Arnheim and Neely, Inc. during the relevant period." Intervener answered the Complaint on January 17, 1968, denying salient allegations thereof.

On December 19, 1968, the parties filed a lengthy Stipulation [hereinafter abbreviated "Stip."].[1] On

[1] Although the Stipulation was filed prior to the Order granting leave to intervene, the Stipulation was executed by counsel for intervener.

March 20, 1969, plaintiff moved for summary judgment ". . . on the ground that the stipulaton of the parties filed herein and the pleadings show that no genuine issue of material fact exists . . . and that the plaintiff is entitled to judgment as a matter of law." On April 2, 1969, defendant and intervener moved for summary judgment asserting lack of a contested factual issue and demanding judgment as a matter of law.[3]

According to the Stipulation, defendant, since January 1, 1963, has managed nine buildings in the Greater Pittsburgh area.[4] [Stip. ¶ 204] Defendant owns none of these buildings. [Stip. ¶ 208][5] Its rentals and sales are performed by approximately fourteen employees on defendant's payroll. [Stip. ¶ 210] The case at bar concerns "persons employed in maintenance, custodial and operational activities at the buildings managed by the defendant. . . ." [Stip. ¶ 2]

The Stipulation sets forth issues formulated from the pleadings. [Stip. ¶¶ 1-3] This Opinion will review these issues of law as tendered.

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[3] The following were also filed: "Plaintiff's Brief in Support of Summary Judgment"; "Defendants' Brief In Support of Summary Judgment", filed jointly by defendant and intervener; and Plaintiff's "Reply Brief in Support of Summary Judgment."

[4] Defendant maintains its principal office and place of business in the Grant Building, Pittsburgh, Pennsylvania. [Stip. ¶ 201]

[5] Defendant owns 50 of 2850 shares of a corporation which owns one of the buildings. [Stip. ¶ 206]

Issue

"Are the various persons employed in maintenance, custodial and operational activities at the buildings managed by the defendant 'employees' of the defendant within the meaning of the Act?" [Stip. ¶ 2]

Paragraph 303 of the Stipulation asserts:

"In the management and maintenance of the managed properties, Arnheim and Neely, Inc., at all times acting pursuant to their contracts with the building owners, engages in the following:

a) Arnheim and Neely, Inc. hires all labor and employees required for the operation and maintenance of the managed premises. The hiring and pay of the building superintendents are occasionally subject to approval of the building owners.

b) Arnheim and Neely, Inc. discharges all labor and employees required for the operation and maintenance of the managed premises.

c) Arnheim and Neely, Inc. supervises all labor and employees required for the operation and maintenance of the managed premises.

d) Arnheim and Neely, Inc. provides a managerial person (separate and apart from the building superintendent) in regard to most, if not all of the managed properties.

e) Arnheim and Neely, Inc. schedules the hours to be worked by all persons engaged at the managed properties.

f) Arnheim and Neely, Inc. determines the rates of pay of all employees engaged at the managed properties, subject to approval of building owners without exception. . . .

g) Arnheim and Neely, Inc. determines the method of payment of all persons engaged at the managed properties, subject to union agreement, if any.

h) Arnheim and Neely, Inc. establishes fringe benefits for all persons engaged at the managed properties, subject to owner's approval.

i) Arnheim and Neely, Inc. negotiates union contracts in regard to those persons engaged at the managed properties who are union members.

j) Arnheim and Neely, Inc. prepares the payroll for all persons engaged at the managed properties.

k) All persons engaged at the managed properties are paid by means of Arnheim and Neely, Inc. checks, drawn on the appropriate owner's account.

l) Persons on Arnheim and Neely, Inc's [sic] staff are assigned managerial responsibility for one or more of the particular buildings.

m) Arnheim and Neely, Inc., through its staff manager or through the building superintendent, assigns the persons engaged at the buildings to the various required duties and supervises the performance thereof.

n) Promotions or reductions in rank and increases or decreases in pay as to the persons engaged at the managed buildings are determined by Arnheim and Neely, Inc., subject to owner's approval.

o) Arnheim and Neely, Inc. makes legal deductions, including Income Tax, Social Security, etc., from the pay checks of all persons engaged at the managed buildings.

p) The 'Contract for Management' (Exhibit I [to the Stipulation]) provides, with respect to the managed buildings, 'that all employees shall be deemed the employees of the OWNER and not the AGENT.'"

Elsewhere in the Stipulation, it is asserted that "[e]ach building owner has separate employer's identification numbers for federal, state, and city payroll taxes." [Stip. ¶ 301(g)]

Section 6 of the Fair Labor Standards Act defines the following terms:

* * * *

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 29 U.S.C. § 203(d).

"(e) 'Employee' includes any individual employed by an employer . . . ." 29 U.S.C. § 203(d).

In *Greenberg v. Arsenal Bldg. Corp.*, 50 F. Supp. 100 (S.D. N.Y. 1943), aff'd per curiam 144 F. 2d 292 (2 Cir. 1944), rev'd in part on other grounds sub nom *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945), where suit was brought against a building rental agent, both the District and the Circuit Court held the defendant to be an "employer" within the meaning of the Act.*

Viewed broadly, the relationship described in the Stipulation between defendant and the employees comports with the statutory standard of employer-employee. See *United States v. Silk*, 331 U.S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757 (1947). It remains only to review certain aspects peculiar to this relationship to determine whether or not they require a contrary determination.

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* *Greenberg* asserted liability on the ground that the rental agent was an "employer" "acting directly or indirectly in the interest of an employer in relation to an employee . . ." 50 F. Supp. 703; cf. *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487 (2 Cir. 1960). As developed more fully, below, our analysis does not view defendant as simply "acting . . . in the interest of an employer."

In *Bartels v. Birmingham*, 332 U.S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947, 172 A.L.R. 817 (1947), band leaders resisted liability to their musicians on the grounds, *inter alia*, that leaders' contracts with ballroom operators specified that the musicians were to be regarded as employees of the operators rather than of the leader. The agreements also required filing of various social security taxes by the operators. Notwithstanding these features, the Supreme Court, reversing the Circuit Court's judgment, held the leaders liable.

The sole remaining element to be considered is the reservation by the owners of a right to review certain of defendant's determinations regarding the management of its building. It may well be that these provisions vest the owners with certain control over the employees. However, the Act recognizes the concept of joint employments. *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F. 2d 105 (5 Cir. 1961); *Wirtz v. Hebert*, 368 F. 2d 139 (5 Cir. 1966); *Mid-Continent Pipe Line Co. v. Hargrave*, 129 F. 2d 885 (10 Cir. 1942). Although the proprietors of the individual buildings may perhaps be deemed employers, *Wirtz v. Columbian Mutual Life Ins. Co.*, 246 F. Supp. 198, 201 (W.D. Tenn. 1965), this circumstance does not foreclose treating defendant as an employer within the meaning of the Act.

Defendant contends that Congress' adoption of the "enterprise" formula in 1961 requires a new test for determining the employer-employee relationship. We cannot agree. The Fair Labor Standards Amendment of 1961, Pub. L. 87-30, 75 Stat. 65 (U.S. Code Cong. & Adm. News 1961, p. 71 et seq.), merely re-

...ended]* the prior provision limiting coverage to employees "engaged in commerce or in the production of goods for commerce" and provided coverage to all employees in an "'enterprise' engaged in commerce or production for commerce." *Maryland v. Wirtz*, ... U.S. 183, 186, 188, 88 S. Ct. 2017, 20 L. Ed. 2d ... (1968). The 1961 amendments were unaccompanied by any modification in the definition of "employee", "employer" or "employment."** The decisional law reflects no change in the pre-1961 principles utilized for determining the employer-employee relationship.

Defendant relies on the statement in *Bartels v. Birmingham*, *supra*: ". . . In the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." 332 U.S. 130. It contends that the business to which they render service is the building rather than defendant.

The statement in Bartels must be interpreted in the light of the judicial history construing the term "employee." As described in *Illinois Tri-Seal Prod...*, Inc. v. *United States*, 353 F. 2d 216 (Ct. Cl. ...), in the years following the enactment of the ... in 1935, the Treasury Department and a majority of the courts held that the term was to be given its common-law meaning, which was grounded in the element of control. In 1947, the Supreme Court de-

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*The bracketed words were subsequently struck by the court and the words "changed the basis of" were substituted.

**The Fair Labor Standards Amendments of 1966, Pub. L. ...-601, 80 Stat. 830 (U.S. Code Cong. & Adm. News 1966, p. ... et seq.) likewise made no modifications in the statutory definitions.

cited *United States v. Silk*, supra, holding that a "constricted interpretation" of the term "employee" to exclude all who are independent contractors within common law concepts failed "to accomplish the purposes of the legislation." 331 U.S. 712.

Defendant seeks to utilize the "economic reality" doctrine to mitigate the indicia of its control of the employees. No warrant for this lies in the decisional law.

Defendant cites a section of the Senate Report No. 1487, 89th Cong., 2d Sess. (1966), on the 1966 Amendments to evidence a legislative intent to treat the employees in question as employees of the building owners:

> ". . . where a person other than the owner of an apartment building is engaged by the owner to perform management services in connection with the operation of the building, these individuals employed at and resident in the building as managers, caretakers, janitors, or in a similar capacity shall be considered for the purposes of this subsection employees of the building owner." 1966 U.S. Code Cong. & Adm. News, p. 3029.

Senate Report No. 1487 proposed the inclusion of equivalent language in an amended section 3(s). However, the Senate-House Conference Committee rejected the Senate's proposed amendment. 1966 Cong. Rec. 22661 (daily ed. Sept. 14, 1966). The Congressional treatment of the issue fortifies our conclusion that the relationship between building employees and management agents should be determined in accordance with the customary principles obtaining under the Act.

We conclude that the stipulated issue must be answered in the affirmative.

ISSUE

"In determining 'annual gross volume of sales made or business done' by the defendant within the meaning of Section 3(s) of the Act, are the gross rentals from the aforementioned management activities to be included or merely the commissions obtained by the defendant from such activities?" [Stip. ¶ 6]

According to the Stipulation, the annual gross rental income collected by defendant from the managed buildings exceeded $1,000,000 per annum. [Stip. ¶ 206] Defendant's commissions on these rentals approximated or exceeded $200,000 in 1964 and 1965, and $250,000 in 1966 and thereafter. [Stip. ¶ 207] Commissions have never exceeded $500,000 per annum. [Ibid]

The Fair Labor Standards Amendments of 1961, *supra*, established as one condition to "enterprise" coverage an "annual gross volume of sales of such enterprise . . . not less than $1,000,000." 29 U.S.C. § 203(s)(3) (1958 Ed. Supp. V). The Fair Labor Standards Amendments of 1966, *supra*, require for the period February 1, 1967, through January 31, 1969, a minimum "annual gross volume of sales" of $500,000 and thereafter of $250,000. 29 U.S.C. § 203 (s)(1) (1964 Ed. Supp. II).

Defendant contends that only its commissions of rentals should be included in determining its "annual gross volume of sales." In this instance, the statutory requirement for coverage would not have been satisfied until February 1, 1969. The Government

argues that the computation of defendant's "annual gross volume of sales" requires inclusion of all rentals collected by defendant.

The Senate Report on the 1961 Amendments expressed the underlying philosophy of the provision and asserted:

> "... The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law." S. Rep., No. 145, 87th Cong., 1st Sess., U.S. Code Cong. & Adm. News 1961, p. 1624. Quoted in *Wirtz v. Southeast Bank & Trust Co. of Sarasota*, 362 F. 2d 357, 362 (5 Cir. 1966); *Wirtz v. Columbian Mutual Life Ins. Co.*, *supra*, 246 F. Supp. 202; *Wirtz v. First National Bank and Trust Co.*, 365 F. 2d 641, 645n (10 Cir. 1966).

Defendant relies on two District Court opinions *Schmidt v. Randall*, 160 F. Supp. 228 (D. Minn. 1958), and *Mitchell v. Carratt*, 160 F. Supp. 261 (S.D. Fla. 1956), wherein the plaintiffs' attempt to include the gross receipts of the defendants' sale of bus tickets were rejected in favor of computing only the defendants' commissions on the sales.

On the other hand, in *Wirtz v. Jernigan*, 405 F. 2d 155 (5 Cir. 1968), at issue was the computation of the defendant's sale of bus tickets as an agent of Greyhound Corporation. Including the gross receipts rather than the defendant's commissions, the Court speaking through Judge McEntee of the First Circuit, asserted:

". . . The district court reasons that defendant is not merely including his profit since he has to pay certain expenses out of the commissions. This is strictly true but nothing follows from it. It is equally true that the restaurant proceeds over and above the price of the food must be further reduced by overhead such as rent and salaries. But if the fact that the commissions do not represent pure profit leads to the conclusion that only the commissions should be considered in determining qualification for the exemption, then the cost of food in the restaurant should also be excluded on the same basis. Yet no one suggests this conclusion for the fundamental reason that proceeds and profits are not the same thing." 405 F. 2d 159.

In *Wirtz* v. *First National Bank and Trust Co.*, *supra*, the landlord's wholly-owned subsidiary received a "management fee" of $30,000 per annum on gross earnings from rentals of over $2,000,000. The Court of Appeals for the Tenth Circuit computed the gross rentals in determining the subsidiary's gross volume of sales." 365 F. 2d 644, 645. Cf. *Wirtz* v. *Columbian Mutual Insurance Co.*, *supra*.

We believe the *Jernigan* case *supra*, represents the better view and the correct application of the Congressional intent. Accordingly, we conclude that gross rentals from defendant's management activities must be included in determining its "annual gross volume of sales made or business done."

Issue V

"Are the business activities of [defendant] . . . particularly those related to the manage-

ment of various buildings, related activities performed through unified operation or common control for a common business purpose so as to constitute an enterprise within the meaning of Section 3(r) of the [illegible] Act . . . ." [Stip. ¶ 1]

Section 3(r), as added to the Act by the 1961 Amendments, *supra*, defined as follows:

"'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. . . ." 29 U.S.C. § 203(r) (1968 Ed. Supp. V).

The statutory defintion of enterprise requires the existance of three elements: (1) related activities, (2) unified operation or common control, and (3) a common business purpose. *Wirtz* v. *Savannah Bank & Trust Co. of Savannah*, *supra*, 362 F. 2d 859. As stated in the Regulations:

". . . the answer to the question whether particular activities are 'related' or not, will depend in each case upon whether the activities serve the business purpose of the enterprise, or whether they serve a separate and unrelated business." 29 C.F.R. § 779.206(b).

Defendant's relevant business includes the management of buildings. [Stip. ¶ 204] Its "Contract for Management" mandates it "[t]o hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises. . . ." [Stip. Exh. 1, p. 2] The activities of such laborers are related to defendant's business.

Paragraph 303 of the Stipulation, quoted *supra* at page 8 et seq. establishes defendant's "common control." Cf. 29 C.F.R. § 779.221. Likewise, the activities of the employees in each building serve a "common business purpose." Cf. 29 C.F.R. § 779.213. Defendant challenges treating the various buildings as "establishments" of defendant. It argues:

"[Plaintiff] has ignored the absolute necessity of establishing each of these various buildings as 'establishments' of the 'enterprise' of [defendant]. Nothing in the Stipulation or in the facts suggest [sic] that [defendant] maintains a distinct place of business anywhere else except at the Grant Building." [Defendant's Brief, p. 10]

The Act does not define the term "establishment." However, the term has been judicially construed to mean "a distinct physical place of business." *Phillips Co. v. Walling*, 324 U.S. 490, 496, 65 S. Ct. 807, 89 L. Ed. 1095, 157 A.L.R. 876 (1945). Accord: 29 C.F.R. § 779.23. This construction was not modified by more recent amendments to the Act. *Wirtz v. Savannah Bank and Trust Co. of Savannah*, *supra*, 362 F. 2d 863.

By its contract with the various buildings, defendant is in the "business" of managing the buildings' janitorial services. Necessarily these must be per-

formed in the buildings. Therefore, each building becomes one of defendant's "places of business."

Defendant argues:

> "... if the buildings themselves are to be considered part of [defendant's] 'enterprise', then how can the government avoid including the building owners as part of that enterprise? But to try to do so would have been ludicrous, for it is apparent ... that these various owners of the buildings are not acting together with each other and [defendant] for a 'common business purpose'. It is even possible that one owner does not know which other buildings [defendant] are [sic] managing for others." [Defendant's Brief, p. 10]

The flaw in this analysis is the correlation of "enterprise" to "buildings", whereas the statutory definition defines "enterprise" as "related activities." 29 U.S.C. § 203(r) (1958 Ed. Supp. V). Moreover, as the Regulations assert: "... the term 'enterprise' is roughly descriptive of a business rather than of an establishment or of an employer although on occasion the three may coincide." 29 C.F.R. § 779.203(b).

We are confronted here with a situation analogous to the case of a chain's store in a supermarket. Treating the entire supermarket as the owner's "establishment" does not preclude treating the particular store as one of the chain's "establishments" and the activities conducted in that "establishment" as part of the chain's "enterprise." Cf. 29 C.F.R. § 779.225.

Issue

"Among the persons ... employed at the various buildings managed by the defendant, are

there at least two persons performing activities which constitute engagement in interstate commerce or in the production of goods for commerce, within the meaning of the Act?" [Stip. ¶ 4]

The Stipulation refers to the activities of various employees in each building. [Stip. ¶ 501] These activities may be categorized as follows: 1) operating elevators carrying mailmen delivering mail and parcel post and carrying delivery men making deliveries, a "portion" of which originate outside Pennsylvania; 2) operating elevators carrying freight to and from the building, a "portion" of which involved interstate shipments; and 3) using in connection with maintenance work "goods . . . including such goods as soap, detergent, waxes, and light bulbs," originating outside Pennsylvania. [Stip. ¶¶ 501, 502]

In determining the coverage of elevator operators in office buildings, absent evidence that tenants are themselves engaged in producing goods for interstate commerce, the mere fact that elevator operators convey mailmen and deliverymen carrying items in interstate commerce does not suffice to bring the elevator operators within the coverage of the Act. *10 East 40th Street Building, Inc.* v. *Callus*, 325 U.S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806, 161 A.L.R. 1263 (1945).[1]

---

[1] Plaintiff relies on *Wirtz* v. *Columbian Mutual Life Ins.* *supra*, as authority for treating the employees in the case at bar as engaged in interstate commerce. In the *Columbian* case, the Secretary sought coverage for elevator operators and building porters. The Court sustained coverage of

With reference to the janitors' use of "soap, detergent, waxes, and light bulbs" which have moved in interstate commerce, two features are important:

1) The term "goods," as defined in Section 3(i) of the Act, ". . . does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof." 29 U.S.C. § 203(i).

2) As stated in 29 C.F.R. § 779.240(a):

"... the mere fact that employees ... are using machinery, equipment, work tools, and the like, which may have been moved in or produced for commerce, does not mean that they are handling, selling, or otherwise working on 'goods' that have been moved in or produced for commerce within the meaning of Section 3(s)."

We conclude that there have not been two employees in each building engaging in interstate commerce.

---

these employees under the "enterprise" doctrine on the basis of the porters' activities, described as follows:

"... The building does not have a freight elevator so that freight and express shipments are lowered into the basement during the day by a sidewalk lift operated by porters, signed for by them, and then at night these shipments are carried by porters, on the passenger elevators, to the offices of the tenants. A substantial part of these shipments have moved in interstate commerce." 246 F. Supp. 208.

In the case at bar, only employees at the Buhl Building "personally" handle the delivery of parcels. [Stip. ¶ 501] Elsewhere, they merely operate elevators carrying deliverymen. [*Id.*] Moreover, the Stipulation does not establish that a "substantial part" of these parcels had originated outside Pennsylvania. The *Columbian* case is inapposite.

Issue

"Prior to February 1, 1967, was defendant's business an enterprise as defined in Sections 3(r) and 3(s)(3) of the Act as it then read?" [Stip. ¶ 7]

We have heretofore concluded that the activities of the employees in question constituted part of the "enterprise" of defendant within the meaning of Section 3(r). Section 3(s), as supplied by the 1961 Amendments, *supra*, provided:

> "'Enterprise engaged in commerce or in the production of goods for commerce' means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:
>
> * * * *
>
> "(3) any establishment of any such enterprise . . . which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000." 29 U.S.C. § 203(s) (1958 Ed. Supp. V).

We have heretofore concluded that the "annual gross volume of sales" of defendant's enterprise requires a computation of the gross rental receipts for the various buildings. However, we have also heretofore concluded that at none of the buildings did defendant have two or more "employees engaged in commerce or in the production of goods for com-

merce." None of the employees were covered under the 1961 Amendments to the Act.

ISSUE

"Does [defendant] employ anywhere two or more persons performing activities which constitute engagement in interstate commerce or in the production of goods for commerce, within the meaning of the Act, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce?" [Stip. ¶ 5]

The Stipulation asserts:

". . . a number of [defendant's] employees employed in its home office were regularly and recurringly engaged in preparing and handling correspondence, remittances, billings, advertising materials, and other miscellaneous goods, including profit and loss statements, governmental reports, and real estate leases, a portion of which were transmitted to points outside the Commonwealth of Pennsylvania, and regularly and recurringly using channels and facilities of interstate communication such as telephones, telegraph, and United States mail in corresponding and communicating with persons and concerns located outside the Commonwealth of Pennsylvania." [Stip. ¶ 211]

Section 3(b) of the Act defines "commerce" to include ". . . communication among the several States or between any State and any other place outside thereof." 29 U.S.C. § 203(b). Employees engaged in these activities are engaged in interstate commerce. *Mitchell* v. *Joyce Agency, Inc.*, 348 U.S. 945, 75 S.

99 L. Ed. 740 (1955), rev'g 211 F. 2d 241 (7 Cir. 1954), rev'g in part 110 F. Supp. 918 (N.D. Ill. 1953); *Mitchell* v. *Kroger Co.*, 248 F. 2d 935 (8 Cir. 1957).

We conclude that defendant employs two or more persons performing activities which constitute engagement in interstate commerce.

ISSUE

"After February 1, 1967, was defendant's business an enterprise as defined in Section 3(r) and 3(s)(1) of the Act as amended?" [Stip. ¶ 8]

We have heretofore determined that defendant's operations constituted an ["establishment"] within the meaning of Section 3(r) of the Act, as amended in 1961. The 1966 Amendments, *supra*, note 6, made no relevant alteration in the language of Section 3(r). Therefore, defendant's relevant activities have also constituted an "enterprise" since February 1, 1967.

The 1966 Amendments, *supra*, adopted a new Section 3(s), which provides:

"'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

"(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales

made or business done is not less than $500,000 and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 . . ." 29 U.S.C. § 203(s) (1965 Ed. Supp. II).

It is not disputed that defendant's enterprise "has employees engaged in commerce." Based on a prior conclusion, it is likewise clear that defendant's "annual gross volume of sales made or business done" exceeds the statutory minimums.

We conclude that after February 1, 1967, defendant's business constituted an "enterprise" within the meaning of the Act.

Issue

"If there is liability under the Act to any of the employees of any of the buildings managed but not owned by [defendant], is it the liability of the defendant or is it the liability of the owner of the buildings?" [Stip. ¶ 3]

Section 6 of the Act imposes liability for payment of the minimum wage and overtime pay on the "employer." 29 U.S.C. §§ 206, 207. We have heretofore noted that defendant is the "employer" within the meaning of the Act; and thus its liability is clear. None of the building owners are parties to this action. Accordingly, any observation we might make regarding their own potential liability would not be dispositive of an issue not properly within the ambit of the

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* The bracketed words was subsequently struck by the court and the word "enterprise" was substituted.

action. Cf. *Arnstein v. 149 Madison Ave. Corp.*, Supp. 385 (S.D. N.Y. 1945), aff'd 156 F. 2d (2 Cir. 1946), aff'd 331 U.S. 199, 67 S. Ct. 1178, Ed. 1432, 169 A.L.R. 1293 (1947), modified her grounds 331 U.S. 795, 67 S. Ct. 1726, 91 L. 1922 (1947).

ORDER OF COURT

AND NOW, to-wit, this 30 day of September, 1938, it is hereby ORDERED and DIRECTED that counsel for the plaintiff submit, after notice to counsel for the defendant and for the intervener, within twenty (20) days, a proposed form of order for final judgment in accordance with the foregoing Opinion.

JOHN L. MILLER
United States District Judge

[Caption Omitted]

ORDER AMENDING OPINION

Now, to-wit, this 6 day of October, 1969, the Opinion filed herein on September 29, 1969, is hereby amended by striking the words "merely repealed" as they appear in the third sentence of the third paragraph on page six, and substituting therefor the words "changed the basis of".

The Opinion is also amended by substituting the word "enterprise" for the word "establishment" in the first sentence of the first paragraph on page fifteen of the said Opinion.

JOHN L. MILLER
United States District Judge

[Caption Omitted]

ORDER

This cause was heard on motion of the plaintiff for summary judgment and on cross motions of the defendant Arabeins and Neely, Inc., and defendant intervenor The Institute of Real Estate Management of the National Association of Real Estate Boards for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court, having considered the pleadings herein and the comprehensive stipulations of facts of the parties, and having heard the argument of counsel, and after due deliberation a written opinion having been duly entered, it is

ORDERED that defendant and defendant intervenor's cross motion for summary judgment be and hereby is gratned with respect to wage payments made prior to February 1, 1967 in conformity with the opinion of this Court entered herein, and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be and hereby is granted with respect to wage payments made after February 1, 1967 in conformity with the opinion of the Court entered herein, that the defendant constitutes an enterprise engaged in commerce and/or in the production of goods for commerce within the meaning of Section 3(s)(1) under the 1966 amendments to the Fair Labor Standards Act (80 Stat. 830), and hot within the meaning of Section 3(s)(3) under the 1961 amendments to the Fair Labor Standards Act (75 Stat. 65), and it is

FURTHER ORDERED that, in the exercise of the Court's discretion, no injunction will be entered regarding future violations of the Act.

December 17, 1969.

JOHN L. MILLER
United States District Judge

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IN THE

Supreme Court of the United States

NO. 71-1598

OCTOBER TERM, 1971

JAMES D. HODGSON, SECRETARY OF LABOR,
Petitioner

v.

ARNHEIM AND NEELY, INC. ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

I Conflict of Circuit Court Decisions

While it is true that there is a direct conflict in the decision rendered herein and the decision in the Fourth Circuit in *Shultz v. Falk*, 439 F (2) 340, cert. denied *sub nom Falk v. Hodgson*, 404 U. S. 827, it is submitted that such inconsistency is not in itself reason for the grant of certiorari in the instant case.

First, it should be remembered that the Third Circuit had the benefit of the decision in the Fourth Circuit, yet declined to follow its reasoning. Indeed, the Third Circuit *reversed* the District Court, which had used the same reasoning as the Fourth Circuit (prior to the latter's decision). Thus, the Third Circuit decision refused to follow *two* other courts, as it was clearly of the opinion that a management firm did not fall within the "enterprise" concept.

Second, the reasoning of the Third Circuit is unassailable. As shown in the Opinion on page 21 of the petition, the Court has refused to hold that the owners of separate buildings can be found to be "related . . . . . for a common business purpose" merely because the owners have hired the same management agent.

The government is attempting to do indirectly what it cannot do directly. If each of the buildings managed by Arnheim and Neely, Inc. were taken separately, coverage under the Act would be lacking in every case. How, then, can a common rental agent transform non-coverage into coverage?

It is a pure distortion of words to say that the activities of Arnheim and Neely, Inc. are "related" and that there is a "common business purpose" in such

activities. Any firm doing business with more than one client or customer would thus be in a "related activity" and have a "common business purpose". It is obvious that the intent of Congress was not to reach this type of situation, but to cover the case of *common ownership* of more than one related business. The typical examples are the so-called "bank and insurance" cases, where the bank or insurance company also owned an office building. The ownership of the bank and office building being one, a true enterprise is found.

See: *Wirtz v. Suwannah Bank & Trust Co.* 362 F (2) 307 (1966)

Wirtz v. Columbian Mutual Life Ins. Co. 246 F Supp. 198 (1965)

Lack of common ownership in the instant case makes the distinction crystal clear.

It is submitted that the sound reasoning in the Third Circuit should not be disturbed.

II Impact of Decision

At the time the instant case was filed, the coverage for the years in question required a gross volume of business of $1,000,000. Since that time, Congress has successively reduced the coverage requirements to $500,000 as of February 1, 1967 and to $250,000 as of February 1, 1969.

It is obvious that many more buildings are individually covered by the present law than were covered under the law at the time this action was instituted. With the increased coverage, the government need not resort to the enterprise doctrine for coverage of individual buildings.

The importance of the decision, therefore, has been greatly diminished — and this Honorable Court need not extend its efforts in an exercise of futility.

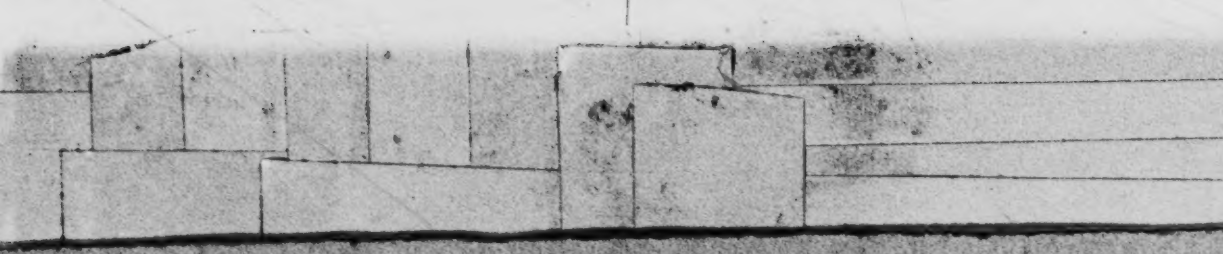
III CONCLUSION

Despite the admonition of the government that many cases are pending which need guidance, the rule of reason and law should prevail over the government's ignorous argument to create an "enterprise". Other Courts forced to choose between the two opinions of the Third and Fourth Circuits should have no difficulty in applying the Third Circuit reasoning is by far the only possible choice.

The petition for writ of certiorari should be refused.

Respectfully Submitted,

EUGENE B. STRASSBURGER, JR.
STRASSBURGER & McKENNA
Attorneys for Respondent
Arnheim & Neely, Inc.



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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1598

JAMES D. HODGSON, SECRETARY OF LABOR, PETITIONER

v.

ARNHEIM AND NEELY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 444 F.2d 609. The opinion of the district court (Pet. App. D) is reported at 324 F. Supp. 987.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1971 (Pet. App. C). A timely petition for rehearing en banc was denied on February 9, 1972 (Pet. App. B). The petition for a writ of certiorari was filed on June 8, 1972, pursuant to an extension

granted by Mr. Justice Brennan, and the petition was granted on October 10, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether all the buildings management activities of a real estate management firm, performed for different owners, should be considered part of a single "enterprise," within the meaning of Section 3(r) of the Fair Labor Standards Act, for the purpose of determining whether the firm's gross volume of sales made or business done is sufficient that its operations are subject to, and its employees entitled to the protection of, the minimum wage and maximum hours provisions of the Act.

STATUTES INVOLVED

Sections 3(r) and 3(s)(1) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 203(r), 203(s)(1), read in pertinent part as follows:

> (r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided*, That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so

operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact it occupies premises leased to it by a person who also leases premises to other retail or service establishments. * * *

* * * * * *

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made

or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated) * * *.

STATEMENT

The Secretary of Labor brought this suit to enjoin Arnheim and Neely, Inc. (hereinafter "respondent") from violating the minimum wage, overtime and recordkeeping provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.*, and from continuing to withhold wages due to its building maintenance and janitorial employees. Respondent admitted that it did not pay the wages or keep the records required by the Act, but claimed that it was not an "employer" of the maintenance workers and, further, that it was not subject to the Act's requirements since it did not meet the "enterprise" coverage test of Section 3(s)(1), 29 U.S.C. 203(s)(1).

Respondent is a real estate firm that manages eight office buildings and one apartment complex in the greater Pittsburgh area, each of which has a different owner (App. 20–22). These management activities are carried out under contracts with the building owners delegating to respondent all the functions required for leasing, operating, and maintaining the buildings, including the following: obtaining tenants; negotiating, executing, and enforcing leases; collecting rents; arranging for the provision of utilities and other services; purchasing supplies; cleaning, repairing, decorating, and altering the premises; and paying all expenses of operation (App. 22, 26–27, 43–46).

Respondent conducts these building management activities from a central office, under the direction of several "staff managers" who are each assigned "managerial responsibility for one or more of the [nine] buildings" (App. 27–30), and who are assisted by clerical and staff personnel. In addition to these employees, respondent hires, discharges, and supervises all the labor required to operate and maintain the managed buildings, including superintendents, assistant superintendents, cleaning ladies, custodial workers, watchmen, elevator operators, and engineers (App. 27, 34–41, 50–51). As the parties stipulated, the functions and responsibilities of respondent with respect to these building employees are as follows (App. 27–29):

> In the management and maintenance of the managed properties, Arnheim and Neely, Inc., at all times acting pursuant to their contracts with the building owners, engages in the following:
>
> (a) Arnheim and Neely, Inc. hires all labor and employees required for the operation and maintenance of the managed premises. The hiring and pay of the building superintendents are occasionally subject to approval of the building owners.
>
> (b) Arnheim and Neely, Inc. discharges all labor and employees required for the operation and maintenance of the managed premises.
>
> (c) Arnheim and Neely, Inc. supervises all labor and employees required for the operation and maintenance of the managed premises.
>
> (d) Arnheim and Neely, Inc. provides a managerial person (separate and apart from

the building superintendent) in regard to most, if not all of the managed properties.

(e) Arnheim and Neely, Inc. schedules the hours to be worked by all persons engaged at the managed properties.

(f) Arnheim and Neely, Inc. determines the rates of pay of all employees engaged at the managed properties, subject to approval of building owners without exception. See Exhibit 8.

(g) Arnheim and Neely, Inc. determines the method of payment of all persons engaged at the managed properties, subject to union agreement, if any.

(h) Arnheim and Neely, Inc. establishes fringe benefits for all persons engaged at the managed properties, subject to owner's approval.

(i) Arnheim and Neely, Inc. negotiates union contracts in regard to those persons engaged at the managed properties who are union members. Exhibit 9 attached is typical of such contracts.

(j) Arnheim and Neely, Inc. prepares the payroll for all persons engaged at the managed properties.

(k) All persons engaged at the managed properties are paid by means of Arnheim and Neely, Inc. checks, drawn on the appropriate owner's account.

(l) Persons on Arnheim and Neely, Inc.'s staff are assigned managerial responsibility for one or more of the particular buildings.

(m) Arnheim and Neely, Inc., through its staff manager or through the building superintendent, assigns the persons engaged at the buildings to the various required duties and supervises the performance thereof.

(n) Promotions or reductions in rank and increases or decreases in pay as to the persons engaged at the managed buildings are determined by Arnheim and Neely, Inc., subject to owner's approval.

(o) Arnheim and Neely, Inc. makes legal deductions, including Income Tax, Social Security, etc., from the pay checks of all persons engaged at the managed buildings.

(p) The "Contract for Management" (Exhibit 1) provides, with respect to the managed buildings, "that all employees shall be deemed the employees of the OWNER and not the AGENT."

The rents collected from the managed buildings, which total more than $1.9 million per year, are deposited into separate bank accounts maintained for each owner. Each account is used by respondent to pay all expenses incurred in operating the building, including the wages of the maintenance workers. After respondent has paid expenses and deducted its commissions, it remits the balance to the building owner (App. 21–24, 44).

The district court held that the janitorial and maintenance personnel employed at the buildings managed by respondent were covered by the Act after February

1, 1967, the effective date of certain amendments to Section 3(s) adopted by Congress in 1966.[1] The court held that respondent was an "employer" within the meaning of the Act (Pet. App. D, pp. 31–37) and that its building maintenance activities were "related" and performed under "common control" for "a common business purpose," so as to constitute a single "enterprise" within the meaning of Section 3(r) (Pet. App. D, pp. 39–42). It also held that the size of this enterprise (*i.e.*, its annual gross volume of sales made or business done) should be measured by the gross rents received from the buildings it managed and not, as respondent had contended, by respondent's commissions (Pet. App. D, pp. 37–39).

The court of appeals sustained the district court's rulings that respondent is an "employer" (Pet. App. A, pp. 16–18) and that the gross volume of sales made or business done should be measured by rents rather than commissions (Pet. App. A, pp. 18–19), but reversed the decision on the ground that each building constitutes a separate and distinct "enterprise" under Section 3(r) (Pet. App. A, pp. 19–23).

The court of appeals concluded that Section 3(s) embodies a legislative policy to avoid undesirable economic consequences to small or inefficient businesses

---

[1] Prior to the 1966 amendments, the statute contained a considerably narrower definition of engagement in commerce. The district court concluded that the employees involved here were not engaged in commerce, and therefore not subject to the Act, prior to the effective date of those amendments. The court of appeals did not reach this issue, and we have not sought review of it by this Court.

[illegible] exempting them from minimum wage requirements. [illegible] respondent maintains a separate bank account for each owner and because application of the Act to the maintenance workers would impose an economic burden on the owners, the court held the "enterprise" definition inapplicable to respondent's operations with respect to the maintenance workers, and looked instead to the building owners. Since the evidence showed no "common business purpose" on the part of the owners, the court found no requirement that the gross rentals of each of the Company's [respondent's] principals be pooled together merely because each principal has employed the Company "as an agent" (Pet. App. A, p. 21). Since each building was, therefore, to be considered a separate "enterprise," the court remanded the case to the district court for findings on whether any particular building generated enough rent to come within the coverage of the Act.

INTRODUCTION AND SUMMARY

As this Court said of the Fair Labor Standards Act in *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 516, "[b]readth of coverage [is] vital to [the Act's] mission," which is "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation" (*id.* at 510). When originally enacted, however, the Act applied only to employees who were themselves engaged in commerce or in the production of goods for commerce. In 1961, Congress recognized that limitation of the Act to these two categories did not afford protection to millions of exploited wage

earners who, although employed by businesses having some employees engaged in covered activities, were not themselves so engaged. To correct this condition and otherwise strengthen the Act, Congress adopted the "enterprise" concept of coverage. See S. Rep. No. 145, 87th Cong., 1st Sess., pp. 2–7, 40–41; H. Rep. No. 75, 87th Cong., 1st Sess., pp. 2–3, 7; see also 107 Cong. Rec. 4587–4588, 5840–5843.

Under this concept, the Act's provisions are made applicable to *all* employees of an enterprise, regardless of whether they are themselves engaged in any covered activities, provided that the enterprise is within one of the categories enumerated in Section 3(s) of the Act and has at least *some* employees engaged in commerce, including employees engaged in handling goods that have moved in commerce. Cf. *Maryland* v. *Wirtz*, 392 U.S. 183, 186, 188–193. As defined in Section 3(r), the term "enterprise" is not restricted to the activities of a single employer or establishment, but includes all those activities which are "related" and which are "performed (either through unified operation or common control) * * * for a common business purpose," regardless of whether "such activities [are] performed in one or more establishments or by one or more corporate or other organizational units" (29 U.S.C. 203 (r)).

In the instant case, respondent is an employer of the building maintenance and janitorial personnel at the nine buildings it manages. Respondent is responsible for the hiring and firing of these employees, the negotiation of union contracts, the establishment of rates of pay and fringe benefits, and supervision and

direction of all other aspects of their employment, subject to approval of the building owners in certain limited particulars. The sole issue before this Court is whether respondent's building management business consists of nine separate "enterprises" (one for each building), as the court of appeals held, or a single "enterprise" within the statutory definition of that term, as the district court held.

Since respondent is in the business of managing properties for others and conducts this business in the same way in connection with each property, its activities are "related" and performed for a "common business purpose." Moreover, this business activity is conducted through "unified operation" and under "common control" of respondent's management. Thus, under the plain language of Section 3(r), respondent's overall building management activities constitute a single "enterprise." This conclusion is reinforced by the legislative history of the adoption of the enterprise concept. The fundamental error of the court of appeals lay in its refusal to consider respondent's activities and its insistence on defining the enterprise in terms of the relationship between the activities and interests of the building owners.

The effect of the court of appeals decision is to impose a narrow construction on the "enterprise" provision that denies the benefits of the Act to thousands of workers who are commonly required to put in long hours at low pay, in violation of the settled and salutary principle that coverage provisions under the Fair Labor Standards Act are to be broadly construed. *Powell* v. *U.S. Cartridge Co., supra; Mitchell* v. *Lub-*

lin, McGaughy & Assoc., 358 U.S. 207, 211; *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427, 429. The Fourth Circuit in *Shultz* v. *Falk*, 439 F. 2d 340, certiorari denied *sub nom. Falk* v. *Hodgson*, 404 U.S. 827, in deciding the identical issue, properly rejected such a restricted reading of the Act.

ARGUMENT

RESPONDENT'S OVERALL BUILDING MANAGEMENT OPERATIONS CONSTITUTE AN "ENTERPRISE" AS THE TERM IS DEFINED IN THE ACT

An employee is entitled to the benefits of the minimum wage and maximum hours provisions of the Fair Labor Standards Act (29 U.S.C. 206(a) and 207(a)(1)) if he is, *inter alia*, "employed in an enterprise engaged in commerce or in the production of goods for commerce * * *." That phrase is defined in Section 3(s)(1) in terms of annual dollar volume of sales made or business done by an enterprise, and the term "enterprise" is, in turn, defined in Section 3(r). The issue here is whether respondent's "enterprise" had a sufficient annual dollar volume that the building maintenance and janitorial personnel employed at the nine buildings managed by respondent are entitled to the coverage and benefits of the Act. If all nine buildings are part of a single "enterprise," then the Act clearly applies;[1] if each is a separate "enterprise,"

[1] An "enterprise" was covered, by virtue of Section 3(s)(1), if its annual gross volume of sales made or business done exceeded $500,000 during the period between February 1, 1967, and January 31, 1969. Subsequent to that date, it has been covered if the annual amount exceeded $250,000. In the past, the nine buildings managed by respondent generated a combined annual rent of approximately $1.9 million (App. 21).

then these employees would be covered only if the particular building at which they are employed generates sufficient revenues to meet the dollar volume specification of Section 3(s)(1).

This action was brought against respondent, and not against the building owners on whose behalf respondent manages these properties. Respondent was properly found by both courts below to be an "employer" of the building maintenance and janitorial personnel within the meaning of Section 3(d) of the Act, 29 U.S.C. 203(d), and the correctness of that determination is not before the Court.* The sole issue is the definition of respondent's "enterprise."

A. THE STATUTORY DEFINITION OF ENTERPRISE COVERS RESPONDENT'S OVERALL BUILDING MANAGEMENT OPERATIONS

Section 3(r) defines "enterprise" as

> the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose * * *.

*No cross-petition for certiorari was filed challenging the determination that respondent is an employer of these employees, nor was this issue mentioned in the Brief in Opposition. A resolution of this issue favorable to respondent would have required a different disposition by the court of appeals—an outright reversal rather than a remand for determination of the revenues of individual buildings. Accordingly, the issue is not before this Court on the present certiorari petition. See *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 430. The same is true with respect to the other issue resolved favorably to the government below—the correctness of measuring the annual gross volume of business done by total rentals rather than by the amount of respondent's commissions.

The determination whether respondent's overall building management business is a single "enterprise" thus depends upon the answers to three questions:

(1) Does the alleged "enterprise" consist of "related activities"?

(2) Are these "related activities" performed "either through unified operation or common control"?

(3) Are they performed by respondent "for a common business purpose"?

Under the facts of this case, an unqualified affirmative response must be given to each of these inquiries.

1. *Respondent's business consists of "related activities."*

Respondent's building management activities, like those involved in the conflicting decision in *Shultz* v. *Falk*, *supra*, "are substantially similar from project to project" (439 F. 2d at 346). Respondent manages each of the nine buildings under the same standard form contract (App. 22). Under this contract, respondent performs exactly the same services with respect to each of the nine buildings—obtaining tenants; negotiating, executing and enforcing leases; collecting rents; arranging for the provision of utilities and other services; purchasing supplies; cleaning, repairing, decorating and altering the premises; and paying all the expenses of the building's operation (App. 26–27). Most of these services are, moreover, performed from a single location by respondent's central office employees.

These activities, which respondent performs for each building owner, are "related" for purposes of

Section 3(r). Although the phrase "related activities" is not itself defined in the Act, the legislative reports accompanying the 1961 Fair Labor Standards Amendments state that "activities are 'related' when they are the same or similar" (S. Rep. No. 145, 87th Cong., 1st Sess., p. 41; H. Rep. No. 75, 87th Cong., 1st Sess., p. 8),[4] which describes the activities here.[5] The Congressional concept of "related" activities is further illuminated by the illustration in the Senate Report of what would constitute "businesses which are unrelated to each other. For example, if a single company owns several retail apparel stores and is also engaged in the lumbering business, the sales of the lumbering business would not be included in the annual dollar volume in determining whether the $1 million test under section 3(s)(1) has been met. The employees of the lumbering

[4] The reports note that activities "are also 'related' when they are auxiliary and service activities such as central office and warehousing activities and bookkeeping, auditing, purchasing, advertising, and other services * * * [or] when they are part of a vertical structure such as the manufacturing, warehousing, and retailing of a particular product or products under unified operation or common control * * *" (*ibid.*).

[5] A number of other courts of appeals have held that activities which are much less similar in nature to each other than those involved here are "related" within the meaning of Section 3(r), *e.g.*, banking activities and the operation of a general office building (*Wirtz* v. *Savannah Bank & Trust Company of Savannah*, 362 F. 2d 857 (C.A. 5); *Wirtz* v. *First National Bank and Trust Company*, 365 F. 2d 641 (C.A. 10)); life insurance and investment activities and the operation of a general office building (*Wirtz* v. *Columbian Mutual Life Insurance Company*, 380 F. 2d 903 (C.A. 6); and a wholesale grocery business and three retail grocery stores (*Wirtz* v. *Barnes Grocer Company*, 398 F. 2d 718 (C.A. 8)).

business would not be included in the 'enterprise' even if the $1 million test were met since they are not engaged in the 'related activities' of the retail stores." S. Rep. No. 145, *supra*, at p. 41. Manifestly, respondent's management activities at different buildings are not "unrelated" in this sense.

2. *Respondent's activities are performed "either through unified operation or common control."*

The fact that the building management activities are all performed through a single legal entity is alone sufficient to establish the requirement of "common control," *Wirtz* v. *Columbian Mutual Life Insurance Company*, 246 F. Supp. 198, 201 (W. D. Tenn.), affirmed, 380 F. 2d 903 (C.A. 6), without regard to the alternative test of "unified operation." But, in any event, that test too is met, since respondent admittedly directs its building management activities through a hierarchy terminating in its central office. Cf. *Shultz* v. *Falk*, *supra*, 439 F. 2d at 346. See also *Shultz* v. *Mack Farland & Sons Roofing Co.*, 413 F. 2d 1296, 1301 (C.A. 5).

3. *Respondent's building management activities have "a common business purpose."*

While the phrase "common business purpose" is not defined in the Act, the legislative history demonstrates that the emphasis was on the word "business," in order to exclude non-business activities from the impact of the broadened coverage achieved by the "enterprise" amendment. Both the Senate and the House Reports stated:[4]

[4] S. Rep. No. 145, *supra*, at p. 41; H. Rep. No. 75, *supra*, at p. 8.

> Eleemosynary, religious, or educational and similar activities of organizations which are not operated for profit are not included in the term "enterprise" as used in this bill. Such activities performed by nonprofit organizations are not activities performed for a common business purpose.

The management of office and apartment buildings by respondent, performed for profit, meets the "common business purpose" requirement of the enterprise definition.

Here, as the court of appeals recognized, respondent's building management activities were all directed toward its single business objective "of maintaining and managing real property" (Pet. App. A, p. 18). The fact that respondent conducts these activities as an agent, rather than as a building owner, does not change their character. That is the nature of respondent's business.

There is nothing in the legislative history of the Act's enterprise coverage provisions which indicates or even suggests that these provisions do not apply to agents. On the contrary, there are explicit statements in the legislative history that the new enterprise coverage provisions would "provide minimum wage and overtime protection * * * for * * * employees in such enterprises as * * * real estate * * *" (S. Rep. No. 145, *supra,* at p. 31; H. Rep. No. 75, *supra,* at p. 13). Real estate enterprises typically operate, as does the respondent, in an agency capacity.

Similarly, it is not material that respondent's employees work at nine different locations. The statutory

definition of "enterprise" expressly "includes all such [related] activities * * * whether performed in one or more establishments * * *." Each office building managed by respondent constitutes one of its "establishments," and since the management of each building constitutes a related part of respondent's business activities, its enterprise encompasses the employees at every building it manages. See H. Rep. No. 1366, 89th Cong., 2d Sess., p. 9; S. Rep. No. 1487, 89th Cong., 2d Sess., p. 7

B. THE COURT OF APPEALS ERRED IN LOOKING TO THE BUILDING OWNERS RATHER THAN TO RESPONDENT IN IDENTIFYING THE ENTERPRISE

Despite the clear applicability of the plain language of the "enterprise" definition, fortified by the legislative history of the adoption of that definition, to respondent's overall building management activities, the court below refused to find that such activities constituted a single enterprise. Instead, it held that coverage would depend on a finding that the buildings themselves, and their owners, were related in a common enterprise. The court thus treated the case as though it were a suit brought against the building owners. It ignored both its own determination that respondent is the employer of the employees at the buildings and the factors establishing respondent's business as a covered enterprise. The fallacy in the court's reasoning is highlighted by the following excerpt from the opinion of the Fourth Circuit in *Shultz* v. *Falk*, *supra*, in which the identical issue was resolved in favor of coverage of the building employees (439 F. 2d at 346):

> * * * It is *defendants'* activities at each building which must be held together by a common business purpose, not all the activities of all owners of apartment projects. All that the enterprise requirement entails is that the defendants maintain under "common control" or as a "unified operation" a set of "related activities" having a "common business purpose," and that their employees be employed as a part of this operation. The organization and operation of defendants' apartment management business satisfy these requirements. Defendants supervise the employees involved here through a hierarchy terminating in their central offices. The services provided are substantially similar from project to project, and have the common purpose of maintaining and operating apartment buildings. The building workers are employed in this enterprise, since they are under defendants' control and carry out its purposes. The fact that they are employed at separate buildings does not prevent their being part of the same enterprise for purposes of the Act * * * [emphasis in original].

The contrary view of the court below is apparently based on its belief that since respondent maintains *"separate bank accounts for each owner,"* it would be unfair, in determining the scope of respondent's enterprise, to pool the rents from the several buildings "merely because each principal has employed the Company as an agent" (Pet. App. A, pp. 20–21; emphasis in original). This conclusion is predicated upon the view that, in adopting a dollar volume test to differentiate between covered and non-covered en-

terprises, Congress sought to protect small or inefficient businesses from the adverse economic impact of the minimum wage provisions and to make coverage turn on "presumed economic capacity to pay a prescribed minimum wage" (*id.* at 20).

The difficulty with this reasoning is twofold. First, it ignores the fact that respondent's business is of sufficient size to come within the statutory test. Secondly, it reflects an unrealistic assessment of the economic impact of respondent's operations. Thus, the fact that respondent maintains separate bank accounts for each building owner does not reduce the magnitude of its total building management activities nor diminish their impact on commerce. As this Court pointed out in *Maryland* v. *Wirtz, supra,* it is this impact which justifies the extension of coverage on an enterprise basis. See S. Rep. No. 1487, 89th Cong., 2d Sess., pp. 7–8; see also *Shultz* v. *Falk, supra,* 439 F. 2d at 347; *Wirtz* v. *First National Bank and Trust Company,* 365 F. 2d 641, 643, 645 (C.A. 10); *Wirtz* v. *Allen Green & Associates, Inc.,* 379 F. 2d 198, 199–200 (C.A. 6).

Respondent purchases all supplies needed for the operation and maintenance of the eight office buildings and one apartment complex; negotiates all contracts for water, gas, and electricity; and hires, supervises and pays the numerous maintenance, rental and clerical employees required to maintain and operate the nine buildings. As a result, these activities will have the same "effect on the flow of men, money, and materials across state lines" (*Wirtz* v. *Allen Green &*

Associates, Inc., supra, 379 F. 2d at 200), whether respondent pays for them from a single bank account or from several separate accounts.

The court of appeals also relied upon an excerpt from the Senate Report which it interpreted as showing a congressional intent to exclude from coverage "separate businesses which use common service organizations" (Pet. App. A, p. 22). This reliance is misplaced. The passage quoted by the court is addressed to situations coming within the proviso to Section 3(r), which prevents the aggregation in a single enterprise of certain independent businesses, such as individual tenants in a shopping center, independently owned franchises, or independently owned and operated retail stores combining for the purpose of joint purchasing or joint advertising. These situations are far different from that presented in the instant case. In none of them does the exempted individual business (logically equivalent to the building owners) employ the shopping center, franchisor, or manufacturer (logically equivalent to respondent) for the purpose of operating its business and hiring, assigning, setting terms and conditions of employment, and paying its employees.[7] Respondent's operations do not fit within the proviso exceptions to which the quotation was addressed, nor do they raise the kinds of problems with which Congress was concerned in enacting the proviso.

[7] Indeed, the shopping center, franchisor, or manufacturer would not be considered an employer under the Act with respect to the individual business's employees, a vital distinction from the situation in the instant case.

Finally, the court below was concerned that a fin
ing of enterprise coverage would impose an unju
economic burden on the owners (*id.* at 23). But th
concern is unwarranted, since it overlooks the fact th
the owners are the beneficiaries of respondent's abili
to make bulk purchases of supplies, to offer t
services of experienced management personnel wh
also manage other buildings, to provide efficient ce
tralized billing and collection services, and otherwi
to operate the buildings more efficiently and at low
cost than would be possible if each building we
managed separately.

In short, the court of appeals has unwarranted
imposed a narrow construction of the Act's coverag
excluding thousands of workers who are common
required to put in long hours at low pay. This is co
trary to this Court's established policy favoring liber
construction of the Act so as to apply it "to t
furthest reaches consistent with congressional dire
tion." *Mitchell* v. *Lublin, McGaughy & Assoc.*, 3
U.S. 207, 211.

CONCLUSION

The judgment of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 71-1598

JAMES D. HODGSON, Secretary of Labor, Petitioner

v.

ARNHEIM AND NEELY, INC., et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT ARNHEIM AND NEELY, INC. and INTERVENOR THE INSTITUTE OF REAL ESTATE MANAGEMENT

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BRIEF FOR RESPONDENT ARNHEIM AND NEELY, INC. and INTERVENOR THE INSTITUTE OF REAL ESTATE MANAGEMENT

QUESTIONS PRESENTED

1. Do the activities of a real estate management firm constitute an "enterprise" within the meaning of Section 3 (r) of the Fair Labor Standards Act, so as to cover employees of buildings which are separately owned but managed by the same firm, and which buildings may or may not be covered by the Act on an individual basis?

Answered in the negative by the court below.

2. Is respondent an "employer" within the meaning of the Act where respondent is merely an agent with no economic interest in the buildings managed other than management fees?

Answered in the affirmative by the court below.

3. Assuming, *arguendo*, that respondent is an enterprise, is the dollar volume test under Section 3 (s) of the Act measured by gross rentals received by the management agent rather than by commissions received by the agent?

Not answered by the court below.

Respondent seeks negative answers to all three questions.

STATEMENT OF THE CASE

Respondent (defendant in the District Court) and intervenor are generally not in disagreement with the statement of the history of the case made by the government on pages 4 through 9 of its brief. The facts in this case were stipulated, and the summarization made by the government on pages 4 through 7 of its brief is accurate so far as it goes; however, several other facts must be noted in order to present a complete picture of Arnheim & Neely, Inc.'s activities.

In addition to its real estate management activities, Arnheim & Neely, Inc. engages in the following business activities: commercial rentals of real property, commercial sales of real property, insurance sales, real estate consultation and appraisals, and residential property sales (Stipulation, par. 203, App. 20).

Pursuant to the typical contract for management entered into between Arnheim & Neely, Inc. and an owner of a managed building, two facts are relevant: (1) The parties agree that all employees are employees of the owner and not the agent (Stipulation, par. 303p, App. 29); and (2) when the management services of

Arnheim & Neely, Inc. are terminated at a particular building, the persons working in that building continue to work there, maintaining their employment relationship with the building and building owner regardless of the change in agents (Stipulation, par. 302, App. 27).

In the management and maintenance of the managed properties, while Arnheim & Neely, Inc. recommends the rates of pay and the fringe benefits of the maintenance and service employees, these rates are subject to approval by the owner of each building in every case (Stipulation, par. 303f & 303h, App. 28). Furthermore, in all of its operations as a manager of a building, Arnheim & Neely, Inc. acts "as agent and in the name of the owner" (Stipulation, par. 301, App. 23-25).

I. INTRODUCTION AND SUMMARY

This case represents an attempt by the government to extend coverage of the Fair Labor Standards Act to an area never before touched—essentially "local" apartments, office and commercial buildings. The government seeks to achieve this result by tying separately owned and unrelated local buildings together into an "enterprise" simply because all of the buildings utilize the services of the same agent or building management firm.

The consequences of such a holding would have far reaching effects on the current practice throughout the United States of many owners of unrelated buildings employing, as agent, the same management firm. If this one fact puts these "local" buildings under the Fair Labor Standards Act, then, of course, the utilization of common building management firms as agent will be affected. It is this disquieting fact that led the Institute of Real Estate Management to seek intervention in this case in the first instance.*

We can see no fact leading to the conclusion that Congress intended, merely by reason of the use of a common management agent, to place buildings under the coverage of the Fair Labor Standards Act, which, because of their "local" nature, would not otherwise be covered.

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*The Institute is a national organization of some 1,650 management firms, managing approximately 7,500 buildings throughout the United States. The importance of this case to each of the Institute's members cannot be stressed too much.

The Court of Appeals rightly held that each separately owned building constituted a distinct entity.

Essentially, respondent and intervenor are asking this Court to uphold the decision of the Court of Appeals for the Third Circuit which held that under the facts presented, Arnheim & Neely, Inc. is not an "enterprise" under Sections 3 (r) and 3 (s) (1) of the Fair Labor Standards Act.

The clear purpose of both the 1961 and 1966 "enterprise" amendments was to prevent fragmentation of coverage, *i.e.*, to eliminate a situation where two employees, working side-by-side, are not equally eligible to receive the protections afforded them by the Act. In advancing this purpose, Congress introduced the "enterprise" concept in 1961, specifically to broaden the number of employees covered by the Act, but not to enlarge the class of employers. *Maryland v. Wirtz,* 392 U.S. 183, 88 S.Ct. 2017, (1968). In addition, it has been clear throughout the history of the Act that Congress was not exercising its full constitutional power under the commerce clause. The "dollar test" under the "enterprise" amendments confirms this point. It has always been true under the Act that "local" businesses were to be outside its scope.

Arnheim & Neely, Inc. acts as, and is legally identifiable as, an "agent" at each separate building. As "agent", respondent is "employed" by each building owner, in a manner not fundamentally different from the employment of the janitorial or maintenance employees who work at each separate building. Although for "enforcement" purposes, Arnheim & Neely, Inc. may be liable as an "employer" if the building owner is liable,

there is no authority existing anywhere for the proposition that an agent rises higher than its principal.

As will be shown in this brief, the government has placed a strained interpretation on the word "enterprise". The Third Circuit refused to accept the government's interpretation and this Honorable Court is asked to do likewise.

It is further respondent's position that even if this court should determine that respondent is an enterprise, nevertheless employees of buildings managed by respondent are not covered by the Act. When the economic realities of the situation are considered, it is apparent respondent is merely an agent, and not an employer within the meaning of the Act.

In addition, the employees referred to above are not covered because the dollar volume should be measured by respondent's commissions, and not by gross rentals.

ARGUMENT

II. RESPONDENT IS NOT AN ENTERPRISE WITHIN THE MEANING OF THE ACT WITH RESPECT TO MANAGEMENT OF BUILDINGS OWNED BY OTHERS.

A. The Buildings Managed by Arnheim & Neely, Inc. Are Essentially Local in Character.

In 1945 this Honorable Court decided the case of *10 East 40th St. Building, Inc. v. Callus*, 325 U. S. 578, 65 S.Ct. 1127 (1945) wherein the employees of an office building were held to be engaged in a local business. This Court said, at page 583 through Mr. Justice Frankfurter:

> "Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business."

The viability of this holding is evidenced by its continued citation in recent cases.

> *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 80 S.Ct. 739 (1960).
>
> *Pollard v. Herbert J. Siegel Org. Inc.*, 272 F. Supp. 821 (D. Md. 1967).
>
> *Batts v. Professional Building, Inc.*, 276 F. Supp. 356 (S.D. W.Va. 1967).

The Government seeks to nullify the *Callus* holding by injecting the "enterprise" theory, and thus make local activities subject to federal control. It is respectfully submitted that the government's position is both

faulty and anomalous. It is faulty because, as will be shown below, no "enterprise" exists. And it is anomalous because it tries to accomplish indirectly what it cannot do directly, namely, hold a purely local activity to be engaged in interstate commerce.

B. The statutory definition of enterprise does not cover respondent's activities.

Petitioner's brief has attempted to show (pp. 14 et seq.) that respondent's activities fall within the definition of "enterprise" in Section 3 (r) which states:

> "related activities performed (either through unified operation or common control) by any person or persons for a common business purpose."

But the Third Circuit has aptly quoted, 444 F(2) 609 (1972) (p. 22 of Pet. for Certiorari) the Senate Report to the Fair Labor Standards Amendments of 1961, which adopted the "enterprise" concept, as follows:

> "The bill also contains provisions which should insure that a small local independent business not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings."
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> *1961 U.S. Code Cong. & Admin. News* 1620, 1660.

Petitioner objects to the use of this reference by the Court (p. 21 of its brief), alleging that the situation described there is not the same situation in the instant case. It is submitted, however, that the *intent* of Congress could not be more clearly stated, namely, that small individual businesses are not to be covered.

A breakdown of the definition of enterprise, paralleling petitioner's brief (pp. 14 to 18) follows, wherein it is shown that respondent cannot be termed an enterprise within the Congressional definition.

1. RESPONDENT'S BUSINESS DOES NOT CONSIST OF "RELATED ACTIVITIES".

Petitioner would have the Court believe that respondent's representation of multiple buildings constitutes the "related activities" referred to in the Act. Under this theory, any agent with more than one client automatically has "related activities". It is submitted, however, that the related activities referred to in the Act refer to related activities of *common ownership*.

The classic example of related activities is found in the so-called "bank" cases, where banking activities and the operation of a general office building were held to be related activities within the meaning of the Act.

Wirtz v. Savannah Bank & Trust Co., 362 F.2d 857 (5th Cir. 1966)

Wirtz v. First National Bank & Trust Co., 365 F.2d 641 (10th Cir. 1966)

The key to the holdings in these cases, and in all "enterprise" cases is the existence of a *common ownership* of the related activities. The thrust of petitioner's argument (footnote, p. 15 of Petitioner's brief) is misplaced. Petitioner would have the Court believe that the bank cases stand for the proposition that dissimilar activities such as banking and office buildings can be held to be enterprises. What the courts are saying, however, is that common ownership of a bank and office building, contained in the same structure, are proper examples of

an enterprise. It is not the less similar activities which were held to be an enterprise, but the *more* similar (identical) ownership of the bank and office building.

In short, the petitioner's attempt to define "related activities" in the context of the internal activities of respondent. Such a strained interpretation of the wording of the Act was never intended by Congress, and has not been evident in the courts, save for *Shultz v. Falk*, 439 F.2d 340 (4th Cir. 1971), *cert. denied sub. nom. Falk v. Hodgson*, 404 U.S. 827, 92 S. Ct. 62 (1971).

The business carried on by one office building is entirely separate from that carried on by another office building, or by an apartment building. Lacking common ownership, there can be no related activity. Common agency can no more create a "related activity" than can two patients with the same doctor.

2. RESPONDENT'S ACTIVITIES ARE NOT PERFORMED "EITHER THROUGH UNIFIED OPERATION OR COMMON CONTROL".

Once again, petitioner's attempt to fit the words to the agency situation creates a strained and unnatural interpretation of the Act.

"Unified operation" refers to the principal's activities, not the agent's. In fact, the term "enterprise" itself connotes ownership, rather than agency. If petitioner is right, Congress might just as well have said that all agents with more than one client are considered an "enterprise". Obviously, this was not the intent of Congress. The Act was specifically passed to cover the situations exemplified by the "bank" cases cited above, where employees of a bank and office building, working side by side with a *common owner* create an enterprise.

3. RESPONDENT'S ACTIVITIES DO NOT HAVE A "COMMON BUSINESS PURPOSE".

Webster defines "common" as:

> "belonging to or equally shared by two or more individuals."

Petitioner argues (p. 17 of its brief) that respondent's activities meet the requirement of "common business purpose". The strained and unnatural application of the words to the facts is thus pin-pointed. If by definition, *common* requires more than *one*, then where is respondent's other entity, with which it is acting in common?

The obvious answer is that "common business purpose" refers to those common activities engaged in by *common owners*. A miscellany of buildings and apartments, with a common agent, but separate ownership, does not satisfy the definition. The issue was succinctly stated by the Third Circuit in its opinion, 444 F.2d 609, 613 (p. 21, Pet. for Certiorari):

> "The owner of each of these buildings is not engaged in a business purpose common to all the other eight building owners merely because each employed a common agent. The record is devoid of any other evidence tending to demonstrate that the nine individual building owners have a 'common business purpose'."

4. ENTERPRISE IS SYNONYMOUS WITH OWNERSHIP.

The theme of "ownership" runs thoughout all of the discussion concerning what constitutes an "enterprise". Ownership is a requisite to "related"; it is a requisite for "unified operation and common control"; and it is

a necessity for "common purpose". In short, ownership becomes a *sina qua non* for enterprise.

But even the *existence* of ownership may not create an enterprise, as shown by a recent case, decided since the instant case in the Third Circuit. In *Hodgson v. University Club Tower, Inc.*, ... F.2d .... (10th Cir. 1972), 72 LC §32,751 the operation of two apartment buildings and a hotel, all owned by a single corporation, was nevertheless held *not* to be an enterprise because of a lack of a common business purpose between the hotel and apartments. The court found the hotel and apartments were not so similar or closely related as to satisfy the statutory definition, and specifically refused to follow the Falk case (*supra*). Evidently the instant case was not brought to the Court's attention.

The question must be raised: If commonly owned hotel and apartments are not an enterprise, how can separately owned office buildings and apartments be considered an enterprise? The logical answer must be that a conglomeration of unrelated buildings cannot become an enterprise merely because of a common management agent.

C. Realities of Respondent's Position.

In *Bartels v. Birmingham*, 332 U.S. 126, 67 S. Ct. 1547 (1947), this Honorable Court, speaking through Mr. Justice Reed, held that the economic realities must be considered when dealing with social legislation. The following facts, *inter alia*, demonstrate clearly that each of the buildings is a separate entity, with no concert of action or "common" purpose.

1. Building employees go with the building. If respondent loses a management contract, the employees remain with the building, and do not lose their jobs. (Stipulation, par. 302e, App. 27). This has already happened in at least one of the buildings in question since this suit was instituted (The Keenan Building).

2. Rates of pay, fringe benefits and other wage and salary matters are subject, *without exception,* to owner approval (Stipulation, par. 303f & 303h, App. 28).

3. Each building carries a separate employer identification number (Stipulation, par. 301g, App. 24).

4. Rentals collected by the respondent are deposited in separate bank accounts for each owner (Stipulation, par. 301a, App. 23), referred to specifically in the opinion of the Third Circuit 444 F.(2) 609, 613 (pp. 20 & 21 of Pet. for Certiorari).

5. Respondent does not have ownership in any of the buildings it manages (Stipulation, par. 208, App. 22).

6. Any economic loss suffered in connection with a particular building is that of the owner (A. 25, par. 301j) referred to specifically in the opinion of the Third Circuit, 444 F.2d 609, 613 (1972) (p. 21 of Pet. for Certiorari).

7. Supplies and other items necessary for the operation of a building are purchased separately for each building, contrary to petitioner's statement in its brief (p. 22).

As can be seen from the above, along with many other stipulated facts, the court below has taken a realistic position with respect to the respondent's status:

> "While as an agent the Company (respondent) is liable as an "employer" to adhere to the strictures of the Act, nevertheless such vicarious responsibility does not require that the gross rentals of each of the Company's principals be pooled together merely because each principal has employed the Company as an agent." 444 F.2d 609, 613 (1972) (p. 21 of Pet. for Certiorari).

In the final analysis, respondent is nothing more, and nothing less, than an agent. As stated in the Third Circuit opinion:

> "It would be anomalous to treat the owners of commercial buildings as proprietors of individual businesses when they manage the buildings themselves and as participating in a 'common business purpose' with other building owners merely because they hire a rental agent who manages other buildings." 444 F.2d 609, 614 (1972) (p. 23 of Pet. for Certiorari).

The court held, in effect, that an agent can rise no higher than his principal, a recognized legal tenet.

D. Realities of the Position of Intervenor, The Institute of Real Estate Management.

The Institute of Real Estate Management of the National Association of Real Estate Boards was permitted to intervene in this case by the District Court on a representation that The Institute has approximately 1,650 members located in 342 different cities of the

United States managing in the aggregate a minimum of 5,000 apartment buildings and 2,500 office buildings. The Institute further represented that the issues involved in this case were vital to all the real estate firms operating throughout the United States and therefore their interest should be separately represented by their own counsel in the capacity of an intervenor.

If the thousands of small apartment buildings and office buildings which are not now deemed covered by the Fair Labor Standards Act, because they are small and local in character, are suddenly to become subject to the provisions of the Fair Labor Standards Act solely because a group of them in any locality employ a real estate management firm, then the individual owners of these small local apartments and office buildings will no longer be able to afford to engage the services of a management firm.

As the Institute sees the issue in this case, it is whether small local apartment and office buildings, not otherwise covered by the Fair Labor Standards Act because they are not in interstate commerce, become covered solely by reason of the fact that a group of such small local buildings employ the services of a common real estate management firm. This brief twice refers to this anomoly by referring to the Third Circuit's opinion on the matter. See pp. 14 & 18 of this brief.

The reality of this case is that the government is not seeking coverage over the real employees of Arnheim & Neely, those for whom Arnheim & Neely stands the cost of wages and overtime. The people the government is seeking to gain coverage for are the persons who work in the nine separate office and apartment buildings, the owners of which are actually charged with their

wages and overtime and who continue in the employment of these separate buildings regardless of who the management firm might be at a particular time.

Thus, we say, as did the Third Circuit Court of Appeals, that the realities of this case are that the government is seeking to make an "enterprise" out of nine separate unrelated small buildings, each with completely separate and unrelated ownership. The government evades the realities of the issue by contending that it is the agent, Arnheim & Neely, which is the "enterprise" involved. In this case, the government is not seeking coverage of the real Arnheim & Neely employees: those who work at the company's office. The government is seeking to obtain enforcement over the principals—the nine separate building owners—by bringing this case against their common agent, Arnheim & Neely.

One clear indication that Congress meant to exclude small businesses was the institution of an economic test. Here these nine separate buildings are in no sense related to a common "enterprise", and each one falls below the required economic level for the years covered by the stipulation; and yet the government's theory would thwart that obvious intention of Congress by merely contending that the "enterprise" it is after is Arnheim & Neely. In reality it is not Arnheim & Neely, but the nine separately owned buildings and their owners.

To argue that the janitors and elevator operators in these local businesses are employees of the management firm does not answer the question because under the Fair Labor Standards Act an agent can be held equally liable with his principal as an "employer". As between the real estate management firm and the own-

ers, though both may be considered "employers" for enforcement purposes under the Act, it is clear that the economic consequences of wages and overtime requirements by the employees working in these buildings are borne entirely by the owners and the earnings of Arnheim & Neely, Inc. are in no way affected. See p. 13 of this brief.

Consequently, we submit that no matter who the government chooses to make the defendant, it cannot change the facts regarding economic realities—and the effect of the government's position is to bring wholly unrelated local apartment and office buildings under the Fair Labor Standards Act merely because they hired Arnheim & Neely. To repeat the Third Circuit again,

> "Were the buildings managed by their owners, the Government would not attempt to link them together as an enterprise bound together by a 'common business purpose.' The building owners' employment of the Company as rental agent does not alter this critical fact." (pp. 21-22 of Pet. for Certiorari).

A victory for the government will not result in the persons working in these nine separate buildings becoming covered by the Act. Their owners will just terminate the services of Arnheim & Neely and this will return them to their former status—small local businesses not covered by the Fair Labor Standards Act.

Congress never intended that the activities of the agent should shape the status of the employer. This Honorable Court has stated this in *Maryland v. Wirtz*, 392 U.S. 183, 188, 88 S.Ct. 2017, 2020 (1968), in the case that sustained the constitutionality of the "enterprise

concept". Speaking of the 1961 amendment providing for the "enterprise concept", the Court said:

> "Thus the effect of the 1961 change was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not to enlarge the class of *employers* subject to the Act."

The result sought by the government is contrary to this determination and was never intended by Congress.

E. The Court of Appeals Was Correct in Looking to the Building Owners Rather Than to Respondent in Identifying the Enterprise.

The petitioner has consistently argued, throughout the lengthy history of this case, that it has not sued the individual buildings and is not interested in holding the individual owners liable. What, in effect, the government is attempting to do is to "wholesale" the liability of the individual owners by holding the common agent.

The Third Circuit specifically rejected the government's position, and thereby rejected the holding of the Fourth Circuit in *Falk* (*supra*). As shown in prior sections of this brief, the definition of "enterprise" is not satisfied by the activities of respondent, which is precisely the reason for the Third Circuit's holding.

No matter what phase of "enterprise" is discussed, the discussion always reverts to the individual buildings. There can be no logical alternative. The petitioner would have the Court put blinders on for purposes of determining coverage, ignoring the "real parties in interest". The Third Circuit has termed this theory as

"anomalous", 444 F.2d 609, 614 (p. 23, Pet. for Certiorari).

One of the buildings managed by Arnheim & Neely, Inc. is University Square #1. At the time this suit was brought, University Square #2, a twin building of equal size, and standing next to University Square #1 so that the two buildings look like one, was not managed by respondent. The two buildings are owned by separate cooperative corporations. If petitioner's theory should prevail, University Square #1 would be covered by the Act, and University Square #2 would be exempt. The exemption would be created, *not* by the nature of the buildings, but by the owner's management agent.

Surely, reason and logic prompted the Third Circuit to say:

> "We think the proper approach under the facts of this case is to consider each of the nine buildings separately." 444 F.2d 609, 614 (1972) (p. 23 of Pet. for Certiorari).

III. EVEN IF RESPONDENT IS AN ENTERPRISE, RESPONDENT DOES NOT MEET THE REQUIREMENTS FOR COVERAGE UNDER THE ACT.

In a long series of cases, this Honorable Court has held that the prevailing party below may, without filing a cross-appeal or a cross-petition for certiorari, assert any ground with support in the record to sustain its position on appeal. In *Jaffke v. Dunham,* 352 U.S. 280, 281, 77 S.Ct. 307, 308 (1957), it was held:

> "A successful party may sustain its judgment on any ground that finds support in the record."

See also *Bondholders Committee v. Comm's.,* 315 U.S. 189, 192 n.2, 62 S.Ct. 537, 539 n.2 (1942).

In *Dandridge v. Williams,* 397 U.S. 471, 475 n.6, 90 S. Ct. 1153, 1156 n.6, (1970), this Honorable Court stated:

> "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court. Compare Langnes v. Green, 282 U.S. 531, 538, 51 S.Ct. 243, 246, 75 L.Ed 520, with Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 567-568, 51 S.Ct. 248, 252, 75 L.Ed. 544. As the Court said in United States v. American Ry. Express Co., 265 U.S. 425, 435-436, 44 S.Ct. 560, 564, 68 L.Ed. 1087: '[I]t is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon

the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed'."

Thus, although respondent is not aggrieved in the least by the judgment of the Court of Appeals, the government would have respondent file a cross-petition for certiorari. Surely, it is unreasonable to assert that a party which is satisfied with the result below must file a precautionary petition for certiorari. The law does not require a vain and useless act. *Board of Supervisors of Louisiana State U. v. Fleming,* 265 F.2d 736 (5th Cir. 1959).

Under these circumstances, it is submitted that the above-stated rule applies, and that respondent may argue here those issues decided adversely to it below. In any event, this Honorable Court has the power to consider those arguments. *Story Parchment Co. v. Paterson Co.,* 282 U.S. 555, 567-8, 51 S.Ct. 248, 252 (1931); *Langnes v. Green,* 282 U.S. 531, 538, 51 S.Ct. 243, 246 (1931).

A. Respondent Is Not the Employer of the Service Employees of the Managed Buildings.

The Court of Appeals has held that respondent is the "employer" of the maintenance and service personnel working at each managed building. It is respectfully submitted that this holding evidences a misunderstanding of the issue involved. The issue is not whether an agent can be held liable as an "employer" under the Act with his principal, but whether he can be held

separate and apart from his principal. However stated, the issue involved represents an attempt on the part of the government to hold a building management agent liable independently from the building owner, his principal. There is no precedent for such a holding, although the Court of Appeals relied on *Greenberg v. Arsenal Bldg. Corp.*, 144 F.2d 292 (2nd Cir. 1944), *rev'd. on other grounds sub nom., Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 65 S.Ct. 895, (1945).

But in that case both the management agent and the owner were named defendants. The Court underscored the proposition that the liability of the management agent *followed* the liability of the owner. The Third Circuit realized the limited extent of respondent's liability as an "employer" when it spoke of the "vicarious responsibility" of respondent. 444 F.2d 609, 613 (1972) (p. 21 of Pet. for Certiorari).

No court has gone so far as to say that an agent's liability may rise higher than that of the principal for whom he acts. Therefore, if one or more of these owners are not liable, then their agent, Anheim & Neely, Inc., cannot be liable either.

In *Mungovan v. Manierre*, 7 L.C. par. 61,646 (N.D. Ill., 1943), a suit against a building agent *alone* was dismissed on motion for summary judgment, on the ground that the owner of the building in question was the employer at common law, and that the management agent was not the employer. The court further said that Congress did not intend to disrupt the employer-employee relationship as fixed by common law principles of agency law. See also *Wirtz v. Instant Handling, Inc.*, 63 L.C. par. 32, 385 (S.D. Ala. 1970).

The accepted test on the question of who is the employer was enunciated by this Honorable Court in *Bartels v. Birmingham*, 332 U.S. 126, 67 S.Ct. 1547 (1947), where "economic realty" was declared to be the important factor. These economic realities have been considered at length elsewhere in this brief, and need not be repeated here.

It is submitted that the "employer" issue must be answered in a way consistent with the agency relationship established at each building and the economic realities of each situation. The answer, in the light of these guidelines, must be that respondent is not an employer within the meaning of the Act.

B. The "Annual Gross Volume of Sales Made or Business Done" By Respondent for Its Management Activities Is Measured By Commissions Received and Not By Gross Rentals.

The petitioner took the position below that "gross rentals" rather than "commissions" are the measure of the "gross volume of sales made" under the minimum requirements of the Act. These dollar-size provisions were placed into the Act as an "economic test." The Senate Report No. 145 elaborated on the point as follows:

> "(The million dollar test) . . . is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce *can afford* to pay his employees the minimum wage under this law." (Emphasis added.) 1961 U.S. Code & Cong. Ad. News, p. 1624.

It is clear that the intention of the "dollar-test" was to measure the size of the business in questions and also its ability to pay. How should that size be measured? It must be by the ownership of the money received by the business, not by the mere fact that, as agent, respondent acts as a conduit for receipts it does not own.

In support of its conclusion that gross rentals are the test, the lower court cited *Wirtz v. First National Bank & Trust Co.*, 365 F.2d 641 (10th Cir. 1966). But in that case, like all the so-called "bank" and "insurance" cases, the defendant *owned* the building in question. Likewise, the lower court cited *Wirtz v. Jernigan*, 405 F.2d 155 (5th Cir. 1968), where the *owner* of the establishment was also the defendant. Since we are dealing here with an agent who is a mere conduit for someone else's money, those cases are not in point.

On the other hand, in *Schmidt v. Randall*, 160 F. Supp. 228 (D. Minn. 1958) the court held that only commissions, rather than gross receipts, should be included. In that case, defendant hotel handled the sale of tickets as an agent for Greyhound Lines. The court stated, at page 230, that inclusion of gross receipts "would present an unrealistic picture of the defendant's business."

As the District court held in *Shultz v. Falk*, 312 F. Supp. 608 (E.D. Va. 1970), *rev'd. sub nom. Hodgson v. Falk*, 439 F.2d 340 (4th Cir. 1971), *cert. denied sub nom., Falk v. Hodgson*, 404 U.S. 827, 92 S.Ct. 62 (1971):

> "The gross volume of sales made or business done is what is sold by the agent, his services. He cannot sell for himself what is not his. What he sells of the owner he sells for the owners as the

owners' agent. This then is the owners' sale. The owner corporation can only act through agents . . . ."

We, of course, agree with the District Court's conclusion, and hasten to add that the Third Circuit has misconstrued the bank cases and *Jernigan*.

In the final analysis, however, the Third Circuit, while holding that gross rentals are the true test of coverage, nevertheless, has negatived its own conclusion by requiring the petitioner to look at the gross rentals of each building separately.

The conclusion, therefore, must be that the gross rentals collected by respondent on behalf of the respective owners of the buildings which it manages, cannot be a proper measure of the "sales made" or "business done" by the respondent. Since the commissions earned by respondent do not reach the statutory minimum, respondent cannot be covered by the Act.

IV. CONCLUSION

It is only since the 1966 amendments to the Act became effective that the government has moved against management agents, apart from building owners, in attempting to enforce the Fair Labor Standards Act. The building-by-building approach, so necessary for a correct assessment of the interstate activities involved, is being abandoned in the hope that, in a single swoop, great numbers of purely local buildings can be brought within the reaches of the Act. Such an attempt flies in the face of consistent Congressional intent as expressed in the Act, and it twists judicial interpretation of several provisions of the Act far from the consistent line

towards which such decisions do tend when read together. A determination that Arnheim & Neely, Inc. is an employer-enterprise of the maintenance and service employees working at managed buildings would be a radical departure from all the painful attempts made by Congress and the courts to draw recognizable and distinct lines with respect to the reach of federal power under the Act and the still significant activities deemed purely "local".

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1598

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,

Petitioner,

—v.—

ARNHEIM AND NEELY, INC., ET AL.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE REALTY ADVISORY BOARD ON LABOR RELATIONS, INC., *AMICUS CURIAE*

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BRIEF OF THE REALTY ADVISORY BOARD ON LABOR RELATIONS, INC., *AMICUS CURIAE*

Statement of Interest

The Realty Advisory Board on Labor Relations, Inc.* (hereafter "RAB") is a membership corporation whose members are owners and managing agents of apartment and commercial buildings in New York City. Its members employ in excess of 20,000 building service employees, and, as representative of its members, the corporation negotiates collective bargaining agreements on their behalf with numerous building service local unions.

* This brief *amicus curiae* is filed pursuant to the consent of all parties to the case. The consents are filed with the Court together with this brief.

Summary of Argument

The principal issue in these proceedings is whether the business of the building owner or that of his managing agent is measured for qualification under the Fair Labor Standards Act's minimum dollar requirement in order to determine whether certain building service workers are "employed in an enterprise engaged in commerce" and so covered by the Act.*

The Third Circuit Court of Appeals held that these workers were "employed" by the owners and, therefore, that it is each owner's business, and not that of the managing agent, that is measured to determine whether the Act applies.

The decision reached by the Third Circuit was compelled by the FLSA's terms and purposes. For an "enterprise" to qualify as being "engaged in commerce" and so be covered by the Act, it must be large enough to do currently at least two hundred and fifty thousand dollars of business each year. The purpose of this minimum dollar requirement, as the legislative history makes clear, is to exclude small businesses in order to protect them from the resultant dislocative effects of the Act's application. This objective can be accomplished only if the measuring entity is that business which ultimately bears the labor costs. Here, the workers are paid out of the owner's funds and the owner alone enjoys the profits and suffers the losses from the building's operation. If the measuring entity used is the business of the managing agent who

* The Fair Labor Standards Act of 1938 as amended, 29 U.S.C. §§201 *et seq.*, is referred to as the "Fair Labor Standards Act," the "FLSA," or the "Act."

receives a set fee and has no equity in the building's operation, application of the minimum dollar requirement would be a sham. It is the building owner, who stands to suffer the dislocation which the Act's minimum dollar requirement seeks to avoid, whose business must be measured for compliance with that requirement.

The importance of interpreting the minimum monetary requirements so as to carry out the Act's purpose to protect small businesses is demonstrated by the facts of the instant case. A decision that the Act applies to these workers would significantly increase the operating costs and likely drive from business many small entrepreneurs in an industry in which supply already lags alarmingly behind the demand. New York City, for example, is plagued by a major shortage of adequate low and middle income housing. Yet, owners of many such units presently in existence are operating enterprises so marginal that any increased labor cost resulting from the FLSA's application could force them out of business. It was Congress' precise intent in excluding such small businesses to protect them, and this Court must not endorse Petitioner's attempt to circumvent fulfillment of that purpose.

Facts

Arnheim and Neely, Inc. (the "Company") is a real estate management company which manages eight office buildings and one apartment complex in the Pittsburgh metropolitan area. Each of these buildings is unrelated and separately owned, and each of the nine owners has independently contracted with the Company for the latter's services. These contracts provide generally that the Company is to operate and maintain the buildings on a day-to-day basis, subject

to the overall direction and approval of the owner.* The owner in turn agrees to pay the Company a set monthly fee. (A. 20-27; 38-44).**

Each building's rent payments and other receipts are collected by the Company and deposited in a separate account for that owner. (A. 21, 24). The Company, as agent for the owner, pays the building's expenses including the payroll and its own fee out of that account. (A. 22). The balance, if any, is returned to the owner and any deficit in the account must be made up by the owner. (A. 22). In sum, any profit or loss from a building's operation is solely the owner's. (A. 23). The Company has no equity in the building and receives the identical fee regardless of profit or loss. (A. 22, 23).

Workers have been hired at each building to provide necessary services. These include elevator operators, custodial workers, building superintendents, watchmen, and other maintenance personnel (hereafter "workers"). (A. 28-37). As noted above, they are paid by the Company as agent for the owner, out of the owner's funds. (A. 21-22).

The Secretary of Labor (hereafter "Petitioner") commenced this action under Fair Labor Standards Act §17 to enjoin the Company, as "employer" of these workers, from violating the FLSA's minimum wage, overtime, and record-keeping provisions and require payment of wages

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* These contracts are similar to the types of contracts that exist between managing agents and owners in the City of New York and elsewhere throughout the nation.

** References to the Appendix to the pleadings in the Third Circuit Court of Appeals are identified by "A." followed by the appropriate page number(s). References to the Brief filed by Petitioner in this Court are identified as "Pet. Br." All statutory citations herein, unless otherwise identified, are to the Fair Labor Standards Act.

allegedly owed the workers. The Company denied that it had violated the Act, claiming that the workers were not in its employ but rather were employees of the owners. The District Court for the Western District of Pennsylvania found that the workers were employed by the Company and that the Company had been covered by the Act since February 1967. 324 F. Supp. 987, 997. The Company appealed this decision to the Third Circuit Court of Appeals.

The Third Circuit reversed. 444 F.2d 609. The Court concluded that Petitioner had failed to prove the FLSA's application to these workers, finding that they were in the employ of the building owners and that none of the owner's businesses had been shown to have done in any year the minimum dollar amount of business necessary to qualify for coverage under the Act. 444 F.2d at 613-14. The Third Circuit recognized that because the owners utilized the Company's services, the Company was an "employer" under the statutory definition. However, the Court rejected the argument that because the Company was an "employer," the rent rolls of all nine buildings ought to be combined to satisfy the rent requirement.

> "While as an agent the Company is liable as an 'employer' to adhere to the strictures of the Act, nevertheless such vicarious responsibility does not require that the gross rentals of each of the Company's principals be pooled together merely because each principal has employed the Company as an agent." 444 F.2d at 613.

This Court granted certiorari to review the judgment of the Court of Appeals.

I.

THE THIRD CIRCUIT'S DECISION THAT THE WORKERS ARE IN THE EMPLOY OF THE OWNERS AND NOT THE COMPANY IS REQUIRED BY FLSA'S LANGUAGE AND PURPOSES.

A. *The Issue Whether the Workers Are "Employed in an Enterprise Engaged in Commerce" Is Properly Before This Court.*

For an employee to be covered by the FLSA's minimum wage and maximum hour provisions, Sections 6 and 7, he must either be (i) "engaged in commerce or in the production of goods for commerce," or (ii) "employed in an enterprise engaged in commerce or in the production of goods for commerce":

> "Sec. 6. (a) Every employer shall pay to each of his employees who in any workweek is *engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce,* wages at the following rates:
>
> * * *
>
> Sec. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is *engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce,* for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (Emphasis added).

Petitioner has contended that the workers are "employed in an enterprise engaged in commerce." (Pet. Br. pp. 9-12).

The term "enterprise engaged in commerce" is defined in pertinent part as follows:

> "'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
>
> (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) . . . , and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated); * * *." (Section 3(s))

For a concern to qualify as an "enterprise engaged in commerce," then, it must have employees who are involved in commerce and have done at least a minimum dollar amount of business per year.

The central question presented by this case is whether the workers are "employed" by the owners or the Company—that is, whether each owner's business or the Company's business is measured for the requisite minimum dollar amount and nexus with interstate commerce.

Petitioner makes the specious argument that the issue of by whom the workers are employed has been resolved by the Third Circuit's finding that the Company is an "employer" as defined in Section 3(d). (Pet. Br. p. 13). Section 3(d) provides in pertinent part as follows:

> "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ."

The Court found only that the Company was an "employer" within the meaning of Section 3(d) and so could be required to share any liability found under the Act. 444 F.2d at 611-12. The Third Circuit then went on to determine that the workers were in fact *employed* not by the Company but by the owners, and so that each of the owner's businesses, and not the Company's, was to be measured for qualification under the Act's minimum dollar requirements. 444 F.2d at 612-14.

While it may seem unusual to contend that an "employer" is not "employing" the workers in question, two different statutory provisions are being discussed, each with a different objective. Section 3(s) sets forth the minimum standards necessary for a business to be subject to Sections 6 and 7. Section 3(d) provides that for businesses that are in fact subject to Sections 6 and 7, the responsibility to comply with the Act can fall upon several different persons as "employers."*

As has often been recognized, it is one thing to determine whether a party comes within the Act's broad definition of "employer"; it is quite another to determine whose business to look to for determining whether the workers at issue are employed by an enterprise that satisfies the requirements of dollar amount of business done and nexus

* The Third Circuit's decision to remand the case to the District Court is not inconsistent with this view. If the District Court were to find a building's rent roll sufficiently large to make the Act applicable, the Company, as an agent of the owner of that building and so an "employer" within the meaning of Section 3(d), could be held responsible for the resultant liability.

with interstate commerce for the FLSA to apply. *See Hodgson* v. *Royal Crown Bottling Company, Inc.*, 324 F. Supp. 342, 346, 347 (N.D. Miss. 1970); *Shultz* v. *Isaac T. Cook Company*, 314 F. Supp. 461, 466-67 (E.D. Mo. 1970); *Mungovan* v. *Manierre*, 7 L.C. ¶61,646 (N.D. Ill. 1943). *See also Wirtz* v. *Lone Star Steel Company*, 405 F.2d 668, 669-70 (5th Cir. 1968); *Wirtz* v. *Country Club Acres, Inc.*, 58 L.C. ¶32,096 at 43,583-86 (N.D.N.Y. 1968).

B. *The History, Terms and Purposes of the FLSA Make It Clear That the Workers Are "Employed" by the Owners and Not the Company.*

The FLSA's definitions are not helpful in determining which of two independent businesses a worker is "employed" by and so which business is measured for qualification as an "enterprise engaged in commerce." "Employ" is defined to "include to suffer or permit to work" (§3(g)); "employee" is defined in pertinent part to "include any individual employed by an employer" (§3(e)); and "employer" in pertinent part to "include any person acting directly or indirectly in the interest of an employer in relation to an employee" (§3(d)). The courts have repeatedly held that these broad, vague statutory definitions do not serve as a meaningful guide to determine the existence or non-existence of an employment relationship. *E.g., Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 728-31 (1947); *Walling* v. *Portland Terminal Co.*, 155 F.2d 215, 217-20 (1st Cir. 1946), *aff'd*, 330 U.S. 148 (1947); *Walling* v. *Sanders*, 136 F.2d 78, 81 (6th Cir. 1943); *Helena Glendale Ferry Co.* v. *Walling*, 132 F.2d 616, 620 (8th Cir. 1942); *Bowman* v. *Pace Co.*, 119 F.2d 858, 860-61 (5th Cir. 1941). As this Court has stated in regard to these definitions, ". . . there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the

employer-employee relationship under the Act." *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 728 (1947).

When Congress has failed to "explicitly define" a term such as "employ," the question whether the workers at issue are employed by a particular business

> "... must be answered primarily from the history, terms and purposes of the legislation. The word ['employee'] 'is not treated by Congress as a word of art having a definite meaning. . . .' Rather 'it takes color from its surroundings . . . [in] the statute where it appears,' *United States* v. *American Trucking Assns.*, 310 U.S. 534, 545, and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.' *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259; *cf. New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552; *Drivers' Union* v. *Lake Valley Co.*, 311 U.S. 91." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 120, 124 (1944).

The significance of which business each worker is employed by, is that Petitioner rests its claim that the FLSA applies to these workers on its argument that they are all "employed in an enterprise engaged in commerce." To qualify as an "enterprise engaged in commerce" in any year, a business had to meet the minimum dollar requirement for that year.* The Company's business arguably

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* The minimum dollar requirement for qualification as a "business engaged in commerce" in any given year is:

1962–66	$1,000,000 in "annual gross volume of sales" (Fair Labor Standards Amendments of 1961, P.L. 87-30, §2(c), 75 Stat. 65)
February 1, 1967–January 31, 1969	$500,000 in "annual gross volume of sales made or business done" (FLSA §3(s))
February 1, 1969	$250,000 in "annual gross volume of sales made or business done" (FLSA §3(s))

met the minimum dollar qualification for every year since 1964; no owner's business was shown to qualify for any year. Thus, whether the Act applied to the workers turned on whether the dollar size of the Company's or each owner's business was considered. A review of the "history, terms and purposes" of the FLSA makes it abundantly clear that when Congress made it a prerequisite for the coverage of these workers that the business in which they are "employed" be an "enterprise engaged in commerce," it was talking about the business of each owner and not the Company's business.

The FLSA's dollar requirement appears on its face to be intended to protect small businesses. This interpretation receives overwhelming support from the Senate Report that accompanied the 1961 Amendment that first added "enterprise" coverage and the dollar requirement to the Act. Fair Labor Standards Amendments of 1961, P.L. 87-30, 75 Stat. 65. In an initial summary section, the Report clearly sets forth the purpose for the Act's requirement that a business have an "annual gross volume of sales" of at least $1,000,000 (presently $250,000) in order to qualify as an "enterprise engaged in commerce":

> "Finally, the million dollar test in the committee bill is not the constitutional standard for coverage. The constitutional standard for coverage is contained in these requirements which have just been discussed. The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law." S. Rep. No. 145, 87th Cong., 1st Sess., 5 (1961).

The remainder of the Report contains numerous additional statements indicating that the dollar limit was intended to protect small businesses. *Id.* at 25 (l. 12-15); 27 (l. 8-21); 31 (l. 15-23); 41 (l. 35-38). *See id.* at 77 (l. 29-44); 99 (l. 10-48) (minority views of Senators Barry Goldwater and Everett M. Dirksen). Significantly, a review of the Senate, House and Conference Reports that accompanied both the 1961 and the 1966 Amendments reveals nothing indicating that the protection of small business was not the purpose of the minimum dollar requirement. *See* Conf. Rep. No. 327, 87th Cong., 1st Sess. (1961); S. Rep. No. 145, 87th Cong., 1st Sess. (1961); H.R. Rep. No. 75, 87th Cong., 1st Sess. (1961); Conf. Rep. No. 2004, 89th Cong., 2d Sess. (1966); S. Rep. No. 1487, 89th Cong., 2d Sess. (1966); H.R. Rep. No. 1336, 89th Cong., 2d Sess. (1966).*

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* The requirement that a business do at least a million dollars in sales to be an "enterprise engaged in commerce" was contained in a bill proposed by the Kennedy Administration. Then Secretary of Labor Arthur Goldberg spoke in support of the bill before a subcommittee of the House Education and Labor Committee. Hearings on H.R. 3935 Before the Special Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 1st Sess., 4 (1960). His remarks regarding the purpose of the proposed minimum dollar requirement for retail and service stores included the following statement:

> "We are covering, or proposing that we cover, large stores, large chainstores. We are proposing to cover—and we use the term 'an enterprise' for that purpose—an enterprise which has through its one or more constituent units, related units—in other words, if they are in the grocery business, grocery stores, markets—which have annual sales of more than a million dollars a year, and that has to be a pretty substantial store or enterprise. We are not talking about the small family store and I do not know why these small stores get involved in this and are concerned about this.
>
> And you may be interested in knowing how many establishments we are seeking to cover, how many enterprises we are seeking to cover. There are hundreds of thousands of small stores throughout the United States. We are only proposing

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Conclusive that the Congressional intent is en numerous
the above excerpt from the Senate Report is that z v. *First*
courts have quoted it for that purpose. *Wirtz*, 645 n. 17
National Bank and Trust Company, 365 F.2d 641; *Company*
(10th Cir. 1966); *Wirtz* v. *Savannah Bank & Trust*; *Shultz* v.
of Savannah, 362 F.2d 857, 862 (5th Cir. 1966); (W.D. Pa.
Arnheim and Neely, Inc., 324 F. Supp. 987, 993 (*Company*,
1969); *Wirtz* v. *Columbian Mutual Life Insurance*) F.2d 903,
246 F. Supp. 198, 203 (W.D. Tenn. 1965), *aff'd*, 380 se, quoted
909 (6th Cir. 1967). The Third Circuit, of cour 3.
this language in its opinion below. 444 F.2d at 61

Once it has been established that the purpose of f the mini-
mum dollar requirement is to avoid economic d dislocation
of small businesses, it becomes readily apparent what the
FLSA means by *"employed* in an enterprise e ngaged in
commerce." (emphasis added). An effect of exte nding the
FLSA's application to a group of employees is t o increase
the cost of the work they perform. In order for the Act's
dollar requirement and the exemption it affords s mall busi-
ness to be effective, a worker must be *"employed* d" by that
business which will suffer those increased costs.

If the FLSA were extended to cover the worker rs at issue
here, the increased cost would be borne solel y by the
owners. According to the Company's contract with each
building owner, the Company collects the rent, pays the
building's expenses, including its own fee and the payroll

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to cover in our retail and service coverage 15,000 enterprises. That is all. That shows you the magnitude of these enterprises, with 100,000 establishments. In other words, for a country as large as ours, we are dealing with a relatively small number of enterprises, 15,000 enterprises. And in the 15,000 enterprises there are 100,000 establishments doing this volume off business."

Id. at 23.

out of it, and gives the balance of the funds, if any, to the owner. (A. 21-24). Any profit or loss from the building's operation is solely the owner's. (A. 23). The Company's income will remain the same whether the Act is held applicable to these workers or not.

In sum, the Third Circuit was correct when it held that each building was a separate "enterprise" for the workers employed on those premises. The term "employed in an enterprise engaged in commerce," in Sections 6 and 7 must mean the building owner. Any other interpretation would make a sham of the Fair Labor Standards Act's clear purpose to protect America's small businesses.

II.

REVERSAL OF THE THIRD CIRCUIT WOULD HAVE AN ADVERSE IMPACT ON AN ALREADY DEPRESSED INDUSTRY.

When the FLSA was enacted in 1938, Congress did not exercise its full constitutional power to cover virtually all employers. While subsequent amendments extended the Act's coverage, Congress exercised caution to continue the exclusion for certain businesses. One such exclusion was for small businesses, defined in terms of annual gross volume of sales.* This protection is consistent with the special protection and exclusion from governmental regulation long recognized by Congress and governmental agencies. *See, e.g.*, Small Business Act, 15 U.S.C. §§631 *et seq.*; small business exemption to the Economic Stabilization Act of 1970, as amended, 6 C.F.R. §101.51.

The adoption of Petitioner's theory that the managing agent's business is the measuring entity for coverage would

* See footnote, p. 10, *supra*.

destroy the small business exemption for this industry. The economic burden of increased labor costs is borne directly and solely by the owner—the small businessman—not the managing agent. To group together all of these small, independent businessmen who individually would not be covered under the FLSA merely because they use a common service, the managing agent, would be to circumvent the Congressional intent to protect these businesses.

The Third Circuit recognized this and concluded that the business of each building owner must stand on its own for coverage under Sections 6 and 7 of the Act. It appropriately noted:

> "Since the economic criteria of the Act is based upon a legislative judgment that only businesses which have attained a substantial gross volume of sales should be covered because of their presumed economic capacity to pay a prescribed minimum wage, apparently *Congress feared that there might be undesirable economic consequences to small or inefficient businesses if they were brought within the scope of the Act.*
>
> "The Company here did not benefit, except as to its commission, as a result of the aggregate gross volume of rentals accruing from all nine buildings. Instead *it acted solely in an agency capacity on behalf of each of nine separate and distinct businesses.* . . . Any economic loss suffered in connection with a particular building is that of the owner. Similarly any profit enjoyed belongs to the individual building's owner. While as an agent the Company is liable as an 'employer' to adhere to the strictures of the Act, nevertheless *such vicarious responsibility does not require that the gross rentals of each of the Company's principals be pooled together merely because each principal has employed the Company as an agent.*" 444 F.2d at 613 (emphasis added).

Application of the FLSA to owners of buildings through the median of managing agents will result in the very dislocation Congress sought to prevent. Significant numbers of apartment buildings are only marginally profitable, or operate at a loss. As a result, the number of buildings abandoned has been steadily on the increase in major cities, creating a critical housing shortage. Kristof, *Economic Facets of New York City's Housing Problems* at 23 (1970).

New York City, like other large cities, is faced with an acute housing shortage that has the greatest impact on the poor and lower middle class. Studies indicate that one of the primary causes of this shortage is the consistent abandonment of buildings because of increased costs of maintenance and operation. The conclusion sought by Petitioner would increase costs that are absorbed solely by the small building owner and would, therefore, accelerate abandonments.

In New York City, the ever-increasing cost of maintenance and operation of apartment buildings has resulted in the abandonment of tens of thousands of housing units each year. In 1968, for example, approximately 7,100 buildings containing 57,000 units were officially recorded as abandoned. Rand Institute Report, *Rental Housing in New York City* at 6 (1970). In addition, tens of thousands of units have become dilapidated each year. According to one report prepared for the Institute for Public Administration, the number of dilapidated buildings increased by 37,000 in 1968 and those classified as deteriorating increased by 55,000. Kristof, *Economic Facets of New York City's Housing Problems* at 19 (1970). These statistics have accelerated in subsequent years.

The additional burden placed upon these marginal apartment buildings by adoption of Petitioner's tortured theory

can only serve to further exacerbate an already severe socio-economic problem. Congress obviously did not intend small, independent businesses like the apartment buildings at issue here to suffer the adverse economic impact of the Act's application.

CONCLUSION

For the forestated reasons, the decision of the Third Circuit should be affirmed and the complaint in all respects dismissed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1598

JAMES D. HODGSON, SECRETARY OF LABOR, P

v. ETITIONER

ARNHEIM AND NEELY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STAT
OF APPEALS FOR THE THIRD CIRCUIT

TES COURT

REPLY BRIEF FOR THE PETITIONER

Although it is Arnheim's activities and the
on commerce that are the subject matter of
the briefs of the two respondents and th ir impact
curiae ignore this fact, as well as the Act's this suit,
of "enterprise," and dwell instead on the e *amicus*
condition and business activities of Arnheim definition
the building owners. In addition, the *amicu* economic
the language of the Act's minimum wage and 's clients,
provisions (Sections 6 and 7) as though th stresses
visions, rather than Section 3(r), are contr overtime
determining what constitutes an "enterpris hose pro-

Extensive argument is addressed to the rolling in
decided favorably to the government by the e."

questions
court of

appeals—whether Arnheim is an employer of these employees and whether the gross volume of business done by Arnheim should be measured by its commissions rather than by the rents collected at the buildings. We adhere to the position that these issues are not properly before this Court.[1] Since they were not discussed in our opening brief, however, we shall answer them here.

1. Contrary to the assumption of respondents and the *amicus curiae*, a holding that Arnheim's building management activities constitute a single enterprise is not tantamount to a holding that each building owner is also a covered enterprise. Nor would the holding we seek require that any building owner compensate its own employees in accordance with the Act's requirements, unless of course its employees are also employed in Arnheim's enterprise, in which event its liability would be limited to such jointly employed workers.

The instant case is thus no different from one involving a protection agency which services nine separately owned and unrelated warehouses. Such ware-

[1] In addition to *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 430, see also *Mills* v. *Electric Auto-Lite*, 396 U.S. 375, 381, n. 4; *Alaska Ind. Bd.* v. *Chugach Assn.*, 356 U.S. 320, 324–325; *Morley Co.* v. *Md. Casualty Co.*, 300 U.S. 185, 191; Stern and Gressman, *Supreme Court Practice* 314–315 (4th ed. 1969); Rule 23(1)(c), *Rules of the Supreme Court*. The cases cited by respondents are distinguishable, since they involve either matters ignored by the lower court (*Dandridge* v. *Williams*, 397 U.S. 471) or matters which would support a simple affirmance, without modification, of the lower court's disposition (*Bondholders Committee* v. *Comm'r*, 315 U.S. 189; *Jaffke* v. *Dunham*, 352 U.S. 280).

houses would not become a single enterprise simply because they all engage the same protection agency. On the other hand, the activities of the protection agency at each of the warehouses would be part of the agency's enterprise.

If the agency's enterprise meets the dollar volume test of Section 3(s), and if the warehouses exert sufficient control over the security guards to qualify as joint employers, they would be jointly liable for the statutory wage requirements, even though the warehouses are not themselves an enterprise and even though their other employees might not be employed in an enterprise or otherwise entitled to the Act's protection.

2. The *amicus* concedes that Arnheim is an "employer" but characterizes that status as derivative only and suggests that Arnheim, as an agent, can have no enterprise greater than that of its principal. The fundamental thrust of the *amicus's* argument is that if Arnheim does not bear the ultimate financial responsibility for payment of wages, the employees cannot be considered part of Arnheim's enterprise (Br. 2, 7, 9–11, 13). We do not agree that Arnheim's status as an employer is derivative only (see point 3, *infra*); in any event, the argument misconstrues the clear statutory requirements.

As pointed out in our main brief, the term "enterprise" refers to "activities" which are "related" and which are "performed (either through unified operation or common control) * * * for a common business purpose." There is no further requirement in the statute that these activities be performed by persons who are employed "by" the enterprise, and to imply any such

requirement would ignore the specific proviso in Section 3(r) that activities of a leased department can be part of a department store's enterprise, even though the department store is not the "employer" of the lessee's employees, and, like Arnheim here, is paid a commission or percentage of the leased department's total sales. See Section 3(r); 29 CFR 779.225.[3]

The significance of this point can be made clear by an example. Suppose that a portion of the space in a department store is leased to a beauty salon; the salon is operated by an independent company, and its employees are not hired or paid by the department store. Nevertheless, it is to the "enterprise" definition that one looks in determining whether the beauty salon is part of the department store's enterprise. If it is, its revenues are includable in determining whether the department store's enterprise meets the dollar requirements of Section 3(s); and the beauty salon's em-

[3] The cases cited at pages 8 and 9 of the *amicus* brief do not support its contrary view. Thus, *Hodgson* v. *Royal Crown Bottling Company, Inc.*, 324 F. Supp. 342 (N.D. Miss.), affirmed, 465 F. 2d 473 (C.A. 5); *Wirtz* v. *Lone Star Steel Company*, 405 F. 2d 668 (C.A. 5); and *Mungovan* v. *Manierre*, 7 *Lab. Cas. para.* 61,646 (N.D. Ill.), do not involve enterprise coverage. In *Wirtz* v. *Country Club Acres, Inc.*, 58 *Lab. Cas. para.* 32,096 (N.D.N.Y.), affirmed, 63 Lab. Cas. para. 32,361 (C.A. 2), which did arise under the Act's enterprise provisions, the scope of the enterprise was determined without reference to the employment status of persons working for the different components of the enterprise. In the remaining case the *amicus* cites, *Shultz* v. *Isaac T. Cook Company*, 314 F. Supp. 461 (E.D. Mo.), the district court, in excluding one building from the management company's enterprise, found that the building maintenance employees were neither hired, fired, nor controlled by the management company and were, therefore, not its employees. It did not address itself to the question whether the building management company performed any activities at the excluded building which would constitute a part of its enterprise.

ployees, being employed in an "enterprise," are thereby entitled to the benefits of the Act even though the company operating the salon might not be a covered enterprise and, further, even though the employees are not employees of the department store, and it has no liability with respect to them under the Act.

Thus, it is the enterprise definition that determines whether the building maintenance personnel are covered by the Act. The only relevance the employment issue has in this case is with respect to Arnheim's responsibility for any violations affecting those employees. On that issue, the Third Circuit ruled in the government's favor. It is that issue which is governed by Sections 6 and 7 of the Act, cited and discussed by the *amicus* (Br. 6–8). Under those sections "every employer" is required to pay the requisite minimum wage and overtime compensation to "each of his employees who * * * is employed in an enterprise * * *." There is no requirement that the employees, in addition to being employed "in" an enterprise, also be employed "by" an enterprise.[8]

[8] The distinction between "in" and "by" is readily apparent and, when compared with other sections of the Act, is obviously deliberate. For example, in a 1949 amendment to Section 13(a)(2), Congress changed language establishing an exemption from coverage for any employee "engaged in" a retail establishment (52 Stat. 1067) to any employee "employed by" a retail establishment (63 Stat. 917; see 95 Cong. Rec. 14932). "[T]he [13(a)(2)] exemption * * * does not include those who happen to be engaged at but not 'employed by' an exempt retail establishment, even though perchance they might perform their functions literally inside the exempt establishment." *Mitchell* v. *Kroger Company*, 248 F.2d 935, 940 (C.A. 8). Here, in contrast to Section 13(a)(2), Sections 6 and 7 protect any employee "employed in an enterprise" regardless of whether he is also employed "by" the enterprise; where, as here, he is employed by both the enterprise and another employer, both em-

3. Although status as an employer under Sections 3(d), 6 and 7 is thus not determinative of the scope of a Section 3(r) enterprise, it is manifest from the facts here that nearly every significant incident of the employment relationship with respect to the building maintenance employees is controlled by Arnheim and not by the building owners. Thus, is it Arnheim which hires, fires and supervises these employees. It also sets the wages and prepares the pay checks. In other words, as the district court concluded (App. 73, n. 5), Arnheim is not "simply 'acting * * * in the interest of an employer'" (which, as the courts below held, would be sufficient under the Act's broad definition), but is itself the primary employer of these workers.[4] See *Herbert Harvey, Inc.* v. *National Labor Relations Board*, 424 F.2d 770, 774–775 (C.A. D.C.); *Herbert Harvey, Inc.* v. *National Labor Relations Board*, 385 F.2d 684 (C.A. D.C.). These workers are essential to Arnheim's contractual agreement to perform all the activities necessary to maintain and operate the buildings, and are thus as much an "integral part" of its business (*Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 730) as are its office workers and other employees.[5]

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ployers are independently liable under Sections 6 and 7 for the Act's minimum wage and overtime payments.

[4] The court of appeals did not hold, as the *amicus* states (Br. 8), that the workers were in fact *employed* not by the Company [Arnheim] but by the owners."

[5] Contrary to the statement in respondents' briefs (Br. 15), the Secretary did charge violations with respect to Arnheim's central office employees, relating to the recordkeeping requirements of the Act (App. 34), and was granted relief on that issue.

The building maintenance employees are no less "real" employees because Arnheim does not ultimately bear the cost of their wages. The courts, including this Court, have repeatedly held that there may be an employment relationship in a variety of situations where the compensation is derived from sources other than the employer's pocketbook. See, *e.g.*, *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386; *Southern Ry. Co.* v. *Black*, 127 F.2d 280 (C.A. 4). As the Fourth Circuit pointed out in *Southern Ry.*, *supra*, when it held that "red caps" were employees of the railroad despite the fact that they were compensated by the passenger (*id.* at 281–282):

> The determinative factor is not the source of their compensation, but the fact that they render services which are necessary to the proper running of [respondents' business], that they are hired or selected by [respondents] and permitted by them to render these services, that they are subject to the general supervision and control of [respondents] in rendering the services and that the [respondents] have the power to discharge them * * *.

Nor is there any merit to respondents' contention that Arnheim has no statutory obligation with respect to the building maintenance employees unless the individual building owner is also subject to the Act's coverage provisions (Br. 14). The courts have consistently recognized, under both the Fair Labor Standards Act and National Labor Relations Act, that an employer who is subject to the Act's requirements cannot enjoy the benefit of a joint employer's exempt

status. See *e.g., Wabash Radio Corporation* v. *Walling*, 162 F. 2d 391, 394 (C.A. 6), *Herbert Harvey, Inc., supra*, 424 F.2d at 774–775. The one case which held that suit could not be brought against the building management company (*Mungovan* v. *Manierre*, 7 Lab. Cas. para 61,646) was decided before *Greenberg* v. *Arsenal Bldg. Corp.*, 144 F.2d 292 (C.A. 2), and other subsequent cases recognizing the independent liability of the building management company. See *e.g., Herbert Harvey, Inc., supra*, 385 F.2d 684; *Herbert Harvey, Inc., supra*, 424 F.2d 770; see also *Barrow* v. *Adams & Co. Real Estate*, 46 N.Y.S. 2d 357.

4. The further argument that Arnheim's coverage under the Act will increase the business costs of Arnheim's clients and make it more expensive for them to use Arnheim's services is a truism which applies to all other businesses and which does not affect the proper disposition of this case.* The extension of the coverage of the Fair Labor Standards Act in 1961 and

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*Labor costs represent only a small part of the total cost of operating an apartment house or office building—7.4 percent and 18.6 percent, respectively. *Apartment Building Income Expense Analysis*, 1970, Chicago: Experience Exchange Committee of the Institute of Real Estate Boards of the National Association of Real Estate Boards; *1969 Office Building Experience Exchange Report*, Building Owners and Managers Association (1969), p. 4. Moreover, in view of the concern expressed for the small building owner, it is significant that the two smallest buildings managed by Arnheim are owned by the F. W. Woolworth Company (App. 21). Finally, as pointed out in our main brief (p. 22), there are undoubtedly advantages to be gained from engaging the management skills of Arnheim which would outweigh any disadvantages that might flow from the slight increase in costs attributable to Arnheim's coverage under the Fair Labor Standards Act.

1966 presumably increased the cost of many goods and services to many small businesses. But this fact does not mean that Congress intended all suppliers to be exempt to the extent that coverage might adversely affect the operating costs of their customers.[1] There is, of course, no broad exemption for small businesses, as suggested by the *amicus* (Br. 11–14). Thus, the Act's coverage has always applied to employees engaged in commerce or in the production of goods for commerce, whether their employer be a large or a small business. See, *e.g.*, *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388 (Act applied to a custom furniture establishment which also fabricated airplane parts and which had an annual dollar volume of $99,117); *Wirtz* v. *Floridice Company*, 381 F. 2d 613 (C.A. 5) (Act applied to a company whose annual sales ranged from $55,861 to $89,692).

5. Respondents' contention that the government is attempting to extend the Act to "local" businesses which Congress intended to exempt (Br. 7–8) is likewise based on its mistaken view that the impact of the

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[1] As the Eighth Circuit pointed out in *Hodgson* v. *A–1 Ambulance Service, Inc.*, 455 F. 2d 372, 374 (reversing a district court order relieving an ambulance company of its liability under the Act on the ground that otherwise the company would "go out of business" and leave the City of Little Rock without an ambulance service):

> But concerned as the court might understandably be about these local aspects, we think that they could not, as against the national policy involved in the Fair Labor Standards Act, provide a basis for discretion as to entering an order for payment of the wage deficiencies engaged in by the Company in violation of the statutory injunction * * *.

Act's coverage provisions must be considered in terms of their impact on Arnheim's clients. Even if Congress had intended to exempt office buildings and apartment complexes from the Act's coverage—which, in fact, it did not (see *Hodgson* v. *Travis-Edwards, Inc.*, 465 F. 2d 1050 (C.A. 5), certiorari denied December 18, 1972, No. 72-593—the enterprise here is not each local building, but the unified activities of Arnheim in managing and operating nine buildings, which activites do have the requisite impact on commerce.[8]

Respectfully submitted.

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Solicitor General.

ANDREW L. FREY,
Assistant to the Solicitor General.

RICHARD F. SCHUBERT,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,
Department of Labor.

JANUARY 1973.

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[8] Respondents' contention that the term "annual gross volume of sales" does not include gross receipts from those sales made in an agency capacity, where, as here, the enterprise performs all the activities necessary to sell or market the goods or property in question, is contrary to both the legislative history (S. Rep. No. 145, 87th Cong., 1st Sess., p. 38; S. Rep. No. 1487, 89th Cong., 2d Sess., pp 7-8) and the pertinent judicial decisions cited by the court below (Pet App. 19). See also *Shultz* v. *Falk*, 439 F. 2d 340 (C.A. 4), certiorari denied *sub nom. Falk* v. *Hodgson*, 404 U.S. 827. Respondents' attempt to distinguish *Wirtz* v. *Jernigan*, 405 F.2d 155 (C.A. 5), on the ground that defendant Jernigan owned the establishment where the sales were made is without substance. Jernigan was not engaged in selling space in the building which he owned, but in selling space on buses which he neither

owned nor operated. Like Arnheim, Jernigan did not "own the receipts from these sales" but was required to remit the balance, after deducting his commissions, to Greyhound. The Fifth Circuit nonetheless held that the full amount of the ticket receipts had to be counted in determining Jernigan's annual dollar volume of sales. The earlier district court decision cited by respondents is contrary to *Jernigan* and the other circuit court cases.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BRENNAN, SECRETARY OF LABOR *v.* ARNHEIM & NEELY, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 71-1598. Argued January 16, 1973—Decided February 28, 1973

Respondent, a fully integrated real estate management company directing from its central office manifold operations at nine separately owned buildings, including leasing the properties for the owners and hiring, firing, supervising, and negotiating the wages of, those employed in the buildings, *held* to be an "enterprise" within the meaning of § 3 (r) of the Fair Labor Standards Act since respondent conducts related activities through unified operation or control, for a common business purpose. It is irrelevant, for purposes of defining the respondent's enterprise under § 3 (r), that the building owners, who are not defendants in this enforcement action under the Act, have no relationship with one another and no common business purpose, since their activities as employers are not at issue here. Pp. 5-9.

444 F. 2d 609, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as to cases subject to orders, as to which there is no dissent. A syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BRENNAN, SECRETARY OF LABOR *v.*
ARNHEIM & NEELY, INC. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-1656. Argued January 16, 1973—Decided February 26, 1973

Respondent, a fully integrated real estate management company deriving from its entire office manhole operations at nine separate owned buildings, including issuing the paychecks for the owners and paying firms supervising, and negotiating the wages of those employed in the buildings, held to be an "enterprise" within the meaning of § 3 (r) of the Fair Labor Standards Act over respondent modern related services through unified operation or control for a common business purpose. [Fn's omitted, for purposes of defining the respondent's enterprise under § 3 (r), that the building owners, who are not defendants in the enforcement action under the Act, have no relationship with one another and no common business purpose, since their services as employers are not at issue here. Pp. 3-9.

464 F. 2d 606 reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1598

Peter J. Brennan, Secretary of Labor, Petitioner, *v.* Arnheim and Neely, Inc., et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February 28, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case began when the Secretary of Labor sued the respondent, a real estate management company, for alleged violations of the Fair Labor Standards Act as amended, 29 U. S. C. § 201 *et seq.* The Secretary sought an injunction against future violations of the minimum wage, overtime, and recordkeeping provisions of the Act, as well as back wages for the affected employees. An employee is entitled to the benefits of the minimum wage and maximum hours provisions of the Act if he is, *inter alia*, "employed in an enterprise engaged in commerce or in the production of goods for commerce. . . ." 29 U. S. C. §§ 206 (a), 207 (a).

As stipulated in the District Court, the respondent company manages eight commercial office buildings and one apartment complex in the Pittsburgh area. With the exception of a minor ownership interest in one of the buildings, the respondent does not own these properties. Its services are provided according to management contracts entered into with the owners. Under these contracts, the respondent obtains tenants for the buildings, negotiates and signs leases, institutes whatever legal

actions are necessary with respect to these leases, and generally manages and maintains the properties. The respondent collects rental payments on behalf of the owners, and deposits them in separate bank accounts for each building. These accounts, net of management expenses and the respondent's fees, belong to the owners of the properties. Payments are periodically made from the accounts to these owners.

The respondent's services with respect to the supervisory, maintenance, and janitorial staffs of the buildings are similarly extensive. The respondent conducts the hiring, firing, payroll operations, and job supervision of those employed in the buildings. It also fixes hours of work, and negotiates rates of pay and fringe benefits—subject to the approval of the owners. The respondent engages in collective bargaining on behalf of the owners where the building employees are unionized. 324 F. Supp. 987, 990-991.

The District Court held that the maintenance, custodial and operational workers at the buildings managed by the respondent were "employees," and that the respondent was an "employer," within the meaning of §§ 3 (d) and 3 (e) of the Act, 29 U. S. C. §§ 203 (d), (e). 324 F. Supp. 987, 990-993. The District Court also held that gross rentals, rather than commissions obtained, were the proper measure of "annual gross volume of sales made or business done" for purposes of the dollar volume portion of the statutory definition of an "enterprise engaged in commerce." *Id.*, 993-994.[1] Though it

[1] In pertinent part, the statute provides that:

"(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

"(1) during the period February 1, 1967, through January 31,

rejected the claim that the respondent was sufficiently engaged in commerce for its employees to be covered for the time before the 1966 amendments to the Act went into effect,[1] the District Court determined that the aggregate activities of the respondent at all nine locations were "related," performed under "common control," and for "a common business purpose," thereby constituting an "enterprise" within the meaning of § 3 (r), 29 U. S. C. § 203 (r). 324 F. Supp. 987, 994–995.

On cross appeals, the Court of Appeals for the Third Circuit affirmed the District Court's determination that the respondent is an "employer" of the building's "employees," and also affirmed the use of gross rentals of

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1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated). . . ." 29 U. S. C. § 203 (s).

[1] Section 3 (s)(3) of the Act, as enacted in 1961, referred in its definition of "enterprise engaged in commerce or in the production of goods for commerce," *inter alia*, to: "*any establishment* of any such enterprise, . . . *which has employees engaged in commerce or in the production of goods for commerce* if the annual gross volume of sales of such enterprise is not less than $1,000,000. . . ." Pub. L. 87–30, 75 Stat. 65, 66 (emphasis added). The District Court construed the statute to require that two or more employees in each building be engaged in commerce in order for that building to be covered under the Act. It found that in no building were there two such employees, and therefore held that there was no coverage under the Act prior to the 1966 amendments. 324 F. Supp. 987, 995–997. The 1966 amendments, see n. 1, *supra*, required only that the "enterprise" have "employees" engaged in commerce, and under this standard the District Court found that the respondent qualified. *Id.*, at 997. Though the Government appealed on this issue, the Court of Appeals did not reach it, 444 F. 2d 609, 614.

the buildings as the proper measure of "gross sales." 444 F. 2d 609, 611–612. The Court of Appeals held that the District Court erred, however, in aggregating the gross rentals of the nine properties to determine the "gross sales" of the respondent's "enterprise." Recognizing that its decision conflicted with a substantially identical case in the Fourth Circuit, *Shultz* v. *Falk*, 439 F. 2d 340, the Court of Appeals held that before separate establishments could be deemed part of a single enterprise, a showing of common business purpose was required. 444 F. 2d 609, 613.

> "If the record in this case revealed that the retention of the Company, as agent, were accompanied by a change in the independent business purposes of the owners—for example facts such as the pooling of profits from the various buildings demonstrating a common business purpose—the result might be different. Here, however, the record reveals that the owners share no common purpose except the decision to hire the Company as their rental or management agent. . . . Without more than here presented, we think the 'enterprise' requirement of the Act has not been satisfied." *Id.*, 614.

Without reaching the issues regarding the respondent's engagement in commerce prior to 1967, the Court of Appeals reversed and remanded for proof of the individual gross rentals of the buildings. *Ibid.* In order to resolve the inter-circuit conflict, we granted the Secretary's petition for certiorari, — U. S. —, which raises the question whether the management activities of the respondent at all of the buildings served should be aggregated as part of a single "enterprise" within the meaning of § 3 (r) of the Act. Since no cross-petition for certiorari was filed by the respondent, the important issues of whether the respondent is in fact an "employer" of the building workers within the meaning of the Act,

and whether gross rentals rather than gross commissions should serve as the measure of "gross sales," are not before us.[3]

The concept of "enterprise" under the Fair Labor Standards Act came into being with the 1961 amendments, which substantially broadened the coverage of the Act. Rather than confining the protections of the Act to employees who were themselves "engaged in commerce or in the production of goods for commerce," 29 U. S. C. §§ 206 (a), 207 (a), the new amendments brought those "employed in an enterprise engaged in commerce" within the ambit of the minimum wage and maximum hours provisions.[4] The Congress defined "enterprise engaged in commerce" to include a dollar volume limitation. The standard in the original amendments included "any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000. . . ." Pub. L. 87–30, 75 Stat. 65, 66, and has since been changed to include enterprises "whose annual gross volume of sales made or business done is not less than $500,000" for the period from February 1, 1967, to January 31, 1969, and those with gross sales of not less than $250,000 thereafter. 29 U. S. C. § 203 (s) (1). The presence of this dollar volume cutoff for coverage under the Act in turn places importance on the Act's definition of "enterprise."

The term "enterprise' is defined by the statute as follows:

> "'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities *whether*

[3] *NLRB* v. *International Van Lines*, — U. S. —, n. 4, and cases there cited. But see n. 8, *infra*.

[4] Pub. L. 87–30, 75 Stat. 65, 67, 69.

performed in one or more establishments or by one or more corporate or other organizational units. . . ." 29 U. S. C. § 203 (r) (emphasis added).

Specific exemptions are noted, making clear that exclusive dealership arrangements, collective purchasing pools, franchises, and leases of business premises from large commercial landlords do not create "enterprises" within the meaning of the Act. *Ibid.*

The District Court correctly identified the three main elements of the statutory definition of "enterprise": related activities, unified operation or common control, and common business purpose. We believe the Court of Appeals erred in holding that the aggregate management activities of the respondent failed to meet these statutory criteria. Once the respondent is recognized to be the employer of all of the building employees, it follows quite simply that it is a single enterprise under the Act. The respondent is, after all, but one company. Its activities in all of the buildings are virtually identical, and are plainly "related" in the sense that Congress intended. As the Senate report accompanying the 1961 amendments indicated: "Within the meaning of this term, activities are 'related' when they are the same or similar. . . ." S. Rep. No. 145, 87th Cong., 1st Sess. 41. The respondent's activities, similarly, are performed "either through unified operation or common control." The respondent is a fully integrated management company directing operations at all nine buildings from its central office. For purposes of determining whether it is an "enterprise" under the Act, it is irrelevant that the relationship between the respondent and the owners is one of agency, that separate bank accounts are maintained for each building, and that the risk of loss and the chance of gain on capital investement belong to the owners, not the respondent. All that is required under the statutory definition is that the respondent's *own* activities be re-

lated and under common control or unified operation, as they plainly are.

In its analysis of this problem, the Court of Appeals placed great weight on the fact that the building owners have no relationship with one another, and have no common business purpose. This is true, but beside the point, for the owners are not defendants in this action and it is not *their* activities that are under examination. As Judge Winter wrote in the conflicting case from the Fourth Circuit, "It is *defendants'* activities at each building which must be held together by a common business purpose, not all the activities of all owners of apartment projects." *Shultz* v. *Falk, supra,* at 346. In the present case, the respondent's activities at the several locations are tied together by the common business purpose of managing commercial properties for profit. The fact that the buildings are separate establishments is specifically made irrelevant by § 3 (r).

The Court of Appeals also cited the portion of the Senate report explaining the exemptions to § 3 (r), noted above, for exclusive dealing contracts, franchises, leasing space in shopping centers, and the like:

> "The bill also contains provisions which should insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings.
>
> "The definition of 'enterprise' expressly makes it clear that a local retail or service establishment which is under independent ownership shall not be considered to be so operated and controlled as to be other than a separate enterprise because of a franchise, or group purchasing, or group advertising arrangement with other establishments or because the establishment leases premises from a person who also

happens to lease premises to other retail or service establishments." S. Rep. No. 145, 87th Cong., 1st Sess. 41.

The Court of Appeals went on to stress that the building owners should not be brought under the Act simply because they dealt with a large real estate management company. This is true but also beside the point, since we deal here with that large management company as a party and, for purposes of this case, as an employer of the employees in question. We do not hold, nor could we in this case, that the individual building owners in *their* capacity as employers [5] are to be aggregated to create some abstract "enterprise" for purposes of the Fair Labor Standards Act.[6]

It is argued that such a straightforward application of the statutory criteria to the respondent's business ignores the significance of the dollar volume limitation included in the § 3 (s) definition of "enterprise engaged in commerce or in the production of goods for commerce." The Court of Appeals cited evidence in the legislative history of the 1961 amendments that indicates a purpose to exempt small businesses from the obligations of the Act. 444 F. 2d 609, 613; S. Rep. No. 145, 87th Cong., 1st Sess. 5. If the individual building owners are en-

[5] As both the District Court and the Court of Appeals noted, the statutory concept of "employer" is ". . . any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 29 U. S. C. § 203 (d). This definition was held to be broad enough that there might be "several simultaneous employers." 444 F. 2d 609, 611–612, 324 F. Supp. 987, 992. See also *Wirtz* v. *Hebert*, 368 F. 2d 139; *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655.

[6] Contrary to the view taken by the dissent, we specifically do not hold that "the buildings and the management company collectively are an enterprise . . . ." We deal solely with the management company and *its* "related activities performed . . . for a common business purpose."

gaged in enterprises too small to come within the reach of the Fair Labor Standards Act, reasoned the Court of Appeals, it would be "anomalous" to treat them as a single enterprise subject to the Act "merely because they hire a rental agent who manages other buildings." 444 F. 2d, at 614. Once again, however, the response to this argument is that it is the respondent management company, not the individual building owners, that has been held in this case to be an "employer" of all the affected "employees." Furthermore, the proper measure of the respondent's size has been held to be the gross rentals produced by properties under its management. It is true that one purpose of the dollar volume limitation in the statutory definition of "enterprise" is the exemption of small businesses, but this respondent is not such a business under these holdings of the Court of Appeals.[7] The argument to the contrary amounts to a collateral attack on the "employer" and "gross sales" determinations made below, and the respondent cannot make such an attack in the absence of a cross-petition for certiorari.[8]

We hold that the District Court was correct in aggregating all of the respondent's management activities as a single "enterprise." Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

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[7] It is stipulated that in all relevant years, the annual gross rental income collected by the respondent exceeded $1,000,000. 324 F. Supp. 987, 993.

[8] We have granted certiorari in *Falk* v. *Brennan, sub nom. Falk* v. *Shultz*, — U. S. —, No. 72-844, to consider whether the proper measure of "gross sales" in this context is gross rentals collected or gross commissions, and whether maintenance employees are "employees" of the management company within the meaning of the Act.

SUPREME COURT OF THE UNITED STATES

No. 71-1598

Peter J. Brennan, Secretary of Labor, Petitioner, *v.* Arnheim and Neely, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February 28, 1973]

MR. JUSTICE WHITE, dissenting.

It is undisputed that for the minimum wage and maximum hour requirements of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.*, to apply to all the employees involved in this case, they must be employed in an "enterprise engaged in commerce or in the production of goods for commerce."[1] 29 U. S. C. §§ 203 (s), 206, and 207. An "enterprise" for the purpose of the Act "means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . ." *Id.*, § 203 (r). An enterprise, however, does not include the related activities performed for the enterprise by an independent contractor nor other specified arrangements, including other-

[1] As discussed in the majority opinion, the Act as passed in 1938, 52 Stat. 1060, covered only employees "engaged in commerce or in the production of goods for commerce." The 1961 amendments, 75 Stat. 65-67, 69, greatly broadened the scope of the Act by adding the "enterprise" concept to cover those employees not directly engaged in commerce or in the production of goods for commerce but employed by an "enterprise" that was. Therefore, those employees in this case not engaged in commerce or in the production of goods for commerce, must belong to an "enterprise" so engaged, if they are to be covered.

wise independent establishments occupying premises leased to them by the same person. *Ibid.*

But for an "enterprise" to be "engaged in commerce or in the production of goods for commerce," the enterprise must have an "annual gross volume of sales made or business done" in an amount not less than the specified statutory minimum. *Id.*, § 203 (s). Congress did not intend to cover all establishments by expanding the coverage of the Act through the enterprise approach. Instead, it drew an economic line. "It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage." S. Rep. No. 145, 87th Cong., 1st Sess., 5. Nor was the definition of enterprise intended to swallow up the exclusion of small businesses. Related activities conducted by separate businesses would be considered a part of an enterprise only "where they are joined either through unified operation or common control into a unified business system or economic unit to serve a common business purpose." *Id.*, at 41. And the express exemptions provided in § 203 (r) from the enterprise concept, the Senate Report said, would "insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the Act by being considered a part of a large enterprise with which it had business dealings." *Ibid.*

In the case before us nine separately and independently owned buildings leasing space to tenants employed the same management company as agent to recommend tenants, collect rents, hire, fire, and supervise employees, and maintain and operate the buildings. The Court holds that even if none of the individual building owners would itself generate gross rentals in sufficient amount to be covered by the Act, the buildings and the management company collectively are an enterprise with collective gross rentals in excess of the statutory minimums

and hence covered by the Act.[2] Because it appears to me that the Court is applying the concept of enterprise in a way which ignores the economic limitations in the Act and congressional intention they represent, I respectfully dissent.

There is no connection between these separately owned buildings other than the fact that they employ the same management company to represent them. They have a common managing agent, but that agent is separately accountable to, and must follow the perhaps diverse directions of, each of its principals. They have no unified operation, do not constitute a unified business system or an economic unit, and surely do not serve a common business purpose. Hence there is no "enterprise" within the meaning of the Act which covers only those "related activities" performed through unified operation or common control "for a common business purpose."

As I have indicated, Congress was not unaware of the possibility of stretching the concept "enterprise" beyond its proper bounds and sought to guard against it. The Senate Committee said: "Thus the mere fact that a group of independently owned and operated stores joined together to combine their purchasing activities or to run combined advertising will not for these reasons mean that their activities are performed through unified operation or common control and they will not for these reasons be considered a part of the same 'enterprise.'" S. Rep. No. 145, 87th Cong., 1st Sess., 42. Common agents, therefore, are not sufficient to convert otherwise independent entities into an enterprise.

The Committee also said: "There may be a number of different types of arrangements established in such cases. The key in each case may be found in the answer

[2] If I agreed that the building owners and their common agent were an "enterprise," I would also agree that the cumulative gross rentals would be the proper measure of coverage.

to the question, 'Who receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit?' " *Id.*, at 42.

Under this standard there can be no question that the buildings are separate economic units and should be treated as such. The manager receives merely a commission for his services. The managing agent manages, but is subject to direction by his principal. The income and expenses for each building are accounted for separately. The owners of each building receive the profits and suffer the losses, if any. Each owner sets the wages and working conditions for each building in the sense that although the manager negotiates such matters, he negotiates under instructions, and it is each owner who must approve them. Each building carries a separate employer identification number. Employees are hired with respect to each building, and supplies and other items necessary for the operation of the buildings are purchased separately for each building. Should a particular building terminate its relationship with the manager, the building employees remain with the building.

The Arnheim and Neely agency unquestionably was an "employer" in so far as its relationship to each of the buildings was concerned, for 29 U. S. C. § 203 (d) defines the term employer as including "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." But this is a far cry from concluding that the separate buildings and their common agent constitute an enterprise engaged in commerce.[3]

[3] This is demonstrated by 29 CFR § 779.203, which provides that the "terms ['employer,' 'establishment,' and 'enterprise'] are not synonymous."

Unquestionably it is the individual owner who bears the burden of the Act and if any one of them, or each of them, individually has gross sales less than the jurisdictional minimums mentioned in the Act, constructing the work "enterprise" concept as the majority does distorts clear congressional intent.

FILE
MAR 19
MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 71-1598

JAMES D. HODGSON, Secretary of Labor, Petitioner

v.

ARNHEIM AND NEELY, INC., et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Respondents respectfully request this Honorable Court to grant a rehearing in the within case, in order to reconsider the result reached herein, for the following reasons:

This Honorable Court has granted certiorari in the case of *Falk v. Brennan,* sub nom *Falk v. Shultz,* . . . . U. S. . . . . , No. 72-844, in order to determine issues which this Court deemed not before it in the instant case. A determination of those issues in favor of Falk would create an anomolous situation, wherein respondents here would be faced with having to comply with a decision which would be contrary to a later decision rendered by this Court. The unfairness of this situation is readily apparent.

With respect to the two issues allegedly not before this Court, the respondents take the following positions:

1. While the lower court held that gross rentals were the measure to be used in determining coverage under the Act, nevertheless the lower court held that each building should be examined separately. In effect, the court held that gross rentals of *each separate building* was the controlling factor, and *not* the gross rentals collected by the agent. Obviously, respondents had no quarrel with this result, and no cross-petition for certiorari was deemed necessary.

2. Similarly, the lower court's holding that the agent was an "employer" must be read in the context of the overall decision requiring a separate examination of each building. The Third Circuit's statement (P. 21, Pet. for Certiorari) that the agent's "vicarious liability" as an employer nevertheless did not require pooling of gross rentals indicated that the court recognized the distinction between an employer for the purpose of *coverage*

under the Act and an employer for the purposes of *enforcement* of the Act. The Third Circuit was merely holding the agent an "employer" under the latter category. Once again, respondents had no quarrel with this interpretation. Likewise, Mr. Justice White, at page 4 of his dissent, recognizes this distinction.

Respondents submit that both issues, taken in the light of the overall decision, were *not* decided adversely to their position, and consequently, no cross-petition for certiorari was indicated. Moreover, this Honorable court has the power to consider any arguments which support respondents' position. Ample authority for this proposition is set forth in respondents' brief at pages 20 and 21, summarized as follows:

The authorities are clear that although an appellee may not attack the decree in order to enlarge his own rights, or lessen the rights of his adversary, nevertheless the appellee may, without taking a cross appeal, urge in support of the decree any matter appearing in the record.

U. S. v. American Ry Express Co., 265 U. S. 425 (1924)

Moreover, no decision has denied the *power* of the court to review objections urged by respondent, although he has not applied for *certiorari*, if the court decrees there is good reason to do so.

Langnes v. Green, 282 U. S. 531 (1931).

Applying the above rulings to the instant case, respondents do not seek to enlarge their rights, but merely to affirm the lower courts holding that:

1. Gross receipts are determined by the total at each separate building, and

2. The agent is the employer only for purposes of enforcement of the Act.

Both holdings were made by the lower court and in so holding, respondents were not harmed.

In the final analysis, the power of this Honorable Court is available in determining these issues in order to create uniformity in the courts. For these reasons, we respectfully request that a rehearing based on these issues be granted, so that both the instant case and *Falk* will be decided on a consistent basis.

The Secretary's position in the Falk case, as evidenced by its Memorandum in opposition to the Falk petition for certiorari, was that he would not oppose a redetermination of the enterprise issue in light of the Arnheim decision (p. 3 of Memorandum). By parallel reasoning, the *Arnheim* case should now be redetermined in the light of *Falk*. We would hope that a rehearing would accomplish this result, and thus avert a great injustice to Arnheim if it is required to comply with a ruling that would affect no other real estate agent in the country.

Respectfully submitted,

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Affidavit.

Commonwealth of Pennsylvania }
County of Allegheny } ss.:

Eugene B. Strassburger, Jr., Esq., being duly sworn according to law, deposes and says that he is counsel for the within named petitioner, and that the foregoing Petition for Rehearing is not being made for the purpose of delay, but is presented in good faith.

EUGENE B. STRASSBURGER, JR.

Sworn to and subscribed before me this 13th day of March, 1973.

HELEN U. RAAB
Notary Public
Pittsburgh, Allegheny County, Pa.

[SEAL]

My Commission Expires February 4, 1977.